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IN THE

Supreme Court of the United States

_____ TERM

No. _____

JOHN K. CALHOUN, Individually and as Attorney for the ESTATE OF C. F. CALHOUN,
Petitioners

vs.

CHARLES C. HERTWIG, Trustee, Et Al,
Respondents

The Petition of John K. Calhoun, et al, for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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OPINIONS BELOW

The denial of the Extraordinary Motion for Rehearing and Intervention in the Circuit Court of Appeals on October 20, 1966, appears as Exhibit B, attached after Appendix One and Exhibit A.[1]

The denial of the Motion for Rehearing and Interven-

[1]Exhibit is a copy of the Order extending the Stay of Mandate to January 29, 1967.

tion in the Circuit Court of Appeals, filed August 9, 1966, Record Vol. II, page 772, appears as Exhibit C, attached.

The opinion and Ruling of the Circuit Court of Appeals of June 28, 1966, R. Vol. II, page 699, to which this appeal is directed, appears as Exhibit D, attached, and is published as 363 F2D 257.

The relevant pages from the Order of the District Court consummating the Plan of Reorganization setting all Creditors' claims to be less than $400,000.00, R. Vol. I, pages 371-372, appear as Exhibit E, attached.

The Judgment of the District Court finding $1,238,500.00 subject to Dea-Nap Liabilities, also before the Circuit Court on another appeal, appears in the Record as Exhibit B to Appellants' Extraordinary Motion for Rehearing, appears here as Exhibit F, attached.

The Opinion and Ruling of the District Court on June 14, 1965, R. Vol. I, pages 249-262, Exhibit G.

JURISDICTION

Notice of judgment of the Court of Appeals denying the Extraordinary Motion for Rehearing upon its judgment of June 28, 1966, was given by letter to the parties indicated in the attached Exhibit B on October 20, 1966. The jurisdiction of this Court is invoked by II U.S.C. 47 c, II U.S.C. 48, 28 U.S.C. 1954.

THE CONSTITUTIONAL QUESTIONS

1. Whether the construction given Georgia Laws 1953, page 545:

> "Obligations to pay attorney's fees upon any note . . . shall be valid and enforceable, and collective as part

of such debt, if such note . . . . be collected by or through an attorney after maturity . . ."

which takes from Secured Creditors, Class 2, not less than $10,000.000 of the payment provided for and already paid to them for their claim under the Chapter X Plan on the ground that this payment was collection attorneys' fees provided for in their secured notes, *which for this reason belongs to their attorneys and is not the property and right of these Secured Creditors, Class 2,* is illegal and contrary to the Fifth Amendment of the Constitution of the United States.

2. Whether the refusal of the Court of Appeals to allow these minors to intervene and be heard as the parties in whom the recovery of the Secured Creditors, Class 2, was then vested after its decision to divest them of their property is in violation of due process under the Fifth Amendment of the Constiution of the United States.

OTHER QUESTIONS PRESENTED

A. Whether a Court of Appeals may hold the failure of a Charter X Plan for a *solvent* Debtor to pay a secured creditor its full claim to be *fair and equitable* in face of the *Los Angeles Lumber*[2] and *Boyd*[3] decisions of this Court?

B. Whether the Court of Appeals may hold the failure of a Chapter X Plan for a *solvent* Debtor to compensate attorneys for work which raised a 35-40 per cent plan to a 89-100 per cent plan to be *fair and equitable* in face of these same decisions of this Court without being in

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[2]*Los Angeles Lumber Co. v. Case,* 308 U.S. 106; 60 S.Ct. 1 (6) *

[3]*Northern Pacific RR Co. v. Boyd,* 288 U.S. 482; 33 SCt. 554*

*Excerpts in point in Appendix One, attached.

actual conflict with the *Consolidated Motor Parts*[4] decision of the Court of Appeals for the Second Circuit.

C. Whether in face of the *Flershem*[5] and *Pepper*[6] decisions this Court of Appeals may refuse to recognize the solvency of this Debtor, either:

By refusing to recognize the Judgment of the District Court of December 18, 1964, confirmed January 26, 1965, finding all the net assets of this joint-Chapter X *subject* to Den-Nap obligations to be $1,238,500.00 . . . or . . .

By refusing to recognize the Judgment of the District Court approving the Plan of Reorganization fixing the total debt claims payable at under $40,000.00 . . . or . . .

By failing to recognize that the Consolidation of the Assets and the Subordination of the Claims of the Controlling Stockholders which make the solvency of this Debtor undeniable, are essential requirements for any fair and equitable plan in this Chapter X.

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[4]*In re: Consolidated Motor Parts, Inc.*, 82 F2D 579 (C.C.2) *

[5]*First National Bank of Cincinnati v. Flershem*, 290 U.S. 504; 54 S.Ct. 298*

[6]*Pepper v. Litton*, 308 U.S. 295; 60 S.Ct. 238*

*Excerpts in point attached in Appendix One.

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. CONST. AMEND. V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

One man invented a practical means of accurately engraving any tire design into a solid mold for retreading automobile and airplane tires at low cost.

The invention, the patents, and the machines embodying them, and other inventions and improvements were sold to Den-Nap Electric Mold Company of Macon, Georgia, by contract in 1946.

The greatly improved retreading molds which resulted coupled with the stronger tire bodies then being made brought forth a wide variety of safe and handsome retreads which revolutionized the industry. Retreaded tires won national consumer acceptance and a near defunct little company, Den-Nap, was raised overnight to the nation's # 2 mold producer with an annual gross of $1,000,000.00 to $2,000,000.00.

The overall compensation, ten per cent of gross, to which this inventor was entitled exceeded $1,000,00.00 under this original contract. Had the inventor been paid this sum, two million in the company earnings would have remained, one each for the two controlling stockholders. However, by various strategems on the part of the two controlling stockholders, this inventor's right was effectively reduced by roughly 50 per cent on two separate occasions so that the residual amount due to the inventor's estate in this Chapter X is a remainder of about one-fourth of the original obligation to him. Meanwhile, during the same period, the controlling stockholders have taken out over $2,000,000.00 and have still ended up with more than $3,000,000.00 in debt claims against 'their' corporation, which causes that corporation to appear to be insolvent, although the District Court actual ajudged its net assets to approximate $1,300,000.00 in Chapter X.

On the facts, this is Pepper v. Litton[7] *put into Chapter X.*

Here, the stockholders in control of a solvent corporation, before and during Chapter X, almost forced the creditors to take 40 per cent. This they did fraudulently by taking out $2,000,000.00 in cash and other assets, by taking $3,000,000.00 more in debt claims against the corporation to be later asserted as Chapter X claims, by diverting the manufacturing and sales to other plants to force a shut-down of the corporation, and then, at last putting this corporation they made to appear insolvent into Chapter X.

One creditor alone put up a fight, but all of the credi-

[7]Supra.

tors got substantially 100 per cent by the subordination of the $3,000,000.00 unpaid remainder of these fraudulent stockholder claims and the reconsolidation of the $1,300,000.00 of Den-Nap assets which resulted from this one creditnor's fight.[8]

The reorganization is over. The creditors have their money. The controlling stockholders have rung out this creditor or as a creditor and a minority stockholder and now have all the assets. But, fortunately, $56,000.00 remains in cash with the trustee[9], which may yet afford appellants their fair compensation.

On the rulings below, this is the *Flershem*[10] case with but one difference. The lower Courts are now letting the controlling stockholders cut the one fighting creditor back down to somewhere near the original 40 per cent offered. This amounts to construing the plan approved and consummated to authorize the cutback, although the language of the plan itself provides that this one creditor, being one of the two secured creditors, is to be paid 100 per cent of the contract of debt,[11] just like the other.

Cutting back this recovery of the minors in whom it is now vested is done a new and different way in two steps. First, by a refusal to reimburse their attorneys who are the appellants for the substantial expenses incurred

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[8]Creditors' Petition for Subordination, R. Vol. I, pp. 263-296, Controlling Stockholders' answer, R. Vol. I, pp. 326-341, and Bound Volume of Original Exhibits to Petition, tendered to lower Courts, Appendix Two, unattached.

[9]R. Vol. I, p. 380, last paragraph.

[10]Supra.

[11]Stockholders' Private Purchase Plan Composition, R. Vol. I, pp. 356-7-8.

and for the considerable work done in raising the plan up sixty points to 100 per cent. Secondly, by grounding this refusal on the fiction[12] that $10,000.00 of the claim has actually been paid to these appellants, their attorneys under this plan, and that $16,000.00 more, or a total of $26,000.00[13] of the recovery of these secured creditors, is a bonus to which they are not entitled, and which appellants, their lawyers, have constructively received and must consider in lieu of any additional payment on their fees to themselves.

In this way the Courts below are allowing the controlling stockholders to subtract from the one fighting creditor group's fair debt contract recovery the cost of that work which forced these controlling stockholders to add $250,000.00 to their Purchase Plan and to pay all the creditors substantially 100 per cent.

In effect, the holding is approval of a penalty to be asserted against the fighting creditor for defeating the fraudulent scheme of the controlling stockholders. The holding takes from the fighting creditor $26,000.00 and takes from appelants, their lawyers, the additional compensation they should receive for their work, expense, and accomplishments for which $45,000.00 was prayed.

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[12]This Court's own decision by Justice Brandies in *Security Mortgage Co. v. Powers,* 278 U.S. 149; 49 S.Ct. 84*, and in the Georgia cases cited in that decision hold contrary as a matter of Georgia law and Chapter X law.

[13]The total of the collection charges and the post-Chapter X interest fraction of the claim contracted for in the secured notes by this solvent debtor is due and payable to this secured creditor as a matter of right under *Consolidated Rock Products v. DuBois,* 312 U.S. 510; S.Ct. 675*.

*Excerpts in point are attached in Appendix One.

The execution of the error begins with the District Court. On July 14, 1965, it holds this work done by appellant-attorneys is not entitled to compensation as a matter of Chapter X law. Another ground given for refusing appellants' fee is bar.[14]

The District Court ruling of July 14, 1965, has already been held to be error under Chapter X by the Fifth Circuit Court of Appeals, which holds at page 9 of its present opinion:

> "... appellants did produce such benefits as would bring them within the fee allowance section. II U.S.C.A. 643 especially in light of the liberal application of the test '... to insure the vigorous representation of all security holders and the protection of minority groups ..'"

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[14]The controlling stockholders then and now vigorously contend that an equitable bar operates against this one creditor and appellants and in favor of the controlling stockholders, who are the ones who pay the fees under their Private Purchase Corposition Chapter X Plan. This District Court making the ruling had this reorganization only the last of its four years' duration. This Court may not be conscious of the inequitable acts of the controlling stockholders which would rule out any equitable bar, and this may account for its "bar" error.

However, this District Court ruling, Exhibit G, appears to definitely find as a fact that these attorneys were actually paid by a $26,000.00 bonus given to their clients under the plan. This must be the basis for the "bar"; i.e. a result of compensation already having been received by a bonus paid to their clients. Since the Court has corrected the District Court's error that no fee was earned, if this "payment" to appellants is the basis for the "bar", the now uncorrected error of the District Court which remains is identical to the now uncorrected error of the Circuit Court which holds very plainly that appellants have already been paid $10,000.00 to $26,000.00.

But, on page 10 of its opinion, the Fifth Circuit Court of Appeals in effect finds[15] that appellants lost their Chapter X fee rights when appellants attorneys accepted the plan for their estate clients during a plan hearing on the fairness and equitability of plans, because, in the sequence of the Court:

1. *Appellants and appellants' clients got $26,000 extra . . .* (this is enlarged upon in last sentence, below)

2. *'Appellants failed to speak of their Chapter X fees . . . when the matter of the settlement (composition?) was before the Court . . . and . . .'*

1. *'Appellants got $10,000 as attorneys fees . . .* (out of the $26,000 referred to in 1 above) . . .'

In short, These Chapter X rulings amount to a holding:

A. It is fair and equitable to pay this secured creditor less than 100 per cent and to earmark a portion of what this creditor is paid as belonging to its attorneys in this case; or, in the alternative . . .

B. It is fair and equitable not to compensate these attorneys for work which caused the increase from a 40 to a 100 per cent pay out in this Chapter X plan because their clients were paid in full and because they orally accepted a plan to pay their clients in full without stating they intended to follow Chapter X provisions for application for their own compensation as provided for under The Bankruptcy Act. 11 U.S.C. 643, 647.

These holdings become worth this Court's correction because in this case the Debtor is solvent as a matter of

[15]This paragraph appears at page 10 of this Court's decision, attached as Exhibit D.

law. Two unreversed Judgments of the District Court, one finding $1,238,500.00 in *net* assets subject to the debts[16], and the other approving $40,000.00 total debt liabilities payable in the Plan[17], establish that this debtor's assets cover its liabilities three times and over. Being solvent this Debtor must pay all legitimate administrative costs and all its creditors in full, unless this Court finds some new principle of law which relieves this Debtor from its contracts, and unless this Court wishes to reject the *Consolidated Motor Parts*[18] decision of the Second Circuit.

ARGUMENTS

As in the *Flershem, Boyd,* and *Pepper* cases[19], the lower Courts have not appreciated the duty of care placed upon controlling stockholders; or, the duty upon reorganization Courts to see to its performance, or even the essentiality of the reorganization Court's understanding of the true condition of each debtor in order to perform its duty to be certain that every reorganization plan approved is fair and equitable. Despite the effort of appellants and their clients to make it clear, the absence of concern and independent inquiry on the part of the lower Courts has prevented their penetration of the screen[20] built by the controlling stockholders to conceal from the Courts the fact that this debtor was solvent and is solvent for all purposes, and that this particular statu-

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[16]Exhibit F, attached.

[17]Exhibit E, R. Vol. I, p. 356, et seq.

[18]Supra.

[19]All Cited supra.

[20]Made by their fraudulent fragmentation of the going-concern and their near impenetrable contract and accounting maze.

tory *Federal Equity Reorganization* under Chapter X has been used to accomplish some grossly inequitable results.

Instead, the lower Courts completely inverted the Equitable reorganization and the Chapter X statutory duties prescribed for these parties. The result has been to relieve the controlling stockholders of the duties that the Congress and the decisions place upon them and to place unfair and unlawful duties of notice[21] and burdens of proof upon the creditors and their attorneys.

Use by the District Court of mistaken bases for its ruling[22] must be considered in light of the finding of the District Court that appellants were not helping but were hindering this Chapter X Estate by raising the 40 per cent payment plan to a 100 per cent payment plan, and that appellants are not entitled to any compensation under any circumstances.

The Fifth Circuit Court decision in this case clearly decides the matter of law in the only possible layful way: It states that the appellant-attorneys must be paid a fair fee as a matter of Chapter X law . . .

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[21]The District Court decision in effect holds the giving of notice at the plain hearing is prerequisite to compensation.

[22]The success of the controlling stockholders in the District Court decision may depend in part upon the mistaken belief in the controlling stockholders' right to an equitable bar against appellants despite Irvin v. Life of Tennessee, 204 Ga. 582.* This success may depend in part upon the mistaken belief that the multi-party composition plan as confirmed included a bilateral settlement of appellants' compensation, which for some reasosn did not have to be written into the composition plan to become effective despite the requirements of law of compositions and requirements of Chapter X plan and composition provisions.

*Excerpts in Appendix One.

But, this Circuit Court decision then goes on to find that: *actual payment of $10,000.00 to $26,000.00 has been made to appellant-attorneys.*

This factual finding is clearly erroneous factually[23] and impossible legally[23] and, constitutionally[24]. This finding may be reached only by a refusal to give effect to the plain language of the plan, which gives 100 per cent to *all* secured creditors, or a refusal to recognize the judgments of the District Court positively establishing the debtor's solvency, which requires that *all* must receive 100 per cent of their contract claims.

It is unfortunate that the Circuit Court erred in failing to recognize that this debtor is solvent under the District Judgments[25]. But, it is even more unfortunate that the Circuit Court could fail to recognize its duty to independently inquire into the actions and the plans of the controlling stockholders and to inquire into and independently understand the debtor's condition. The first of these errors caused injustice in this one case. But, the second of these errors is general in nature and unless corrected by this Court shall cause a great number of similar errors in this and all the other Circuits.

Controlling stockholders too often rebel at the duty of

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[23]Stockholders' Private Purchase Plan Composition Plan, R. Vol. I. pp. 356-7-8.

[24]In that the constitution does prolect private property.

[25]If the Circuit Court could recognize this one fact, it would see that to take from the one dissenting creditor the payment which these appellant-attorneys must receive, to avoid the initial error-of-law, is to commit a second error-of-law against the dissenting creditor and to destroy the fairness of the plan, *after its consummation.*

protection the people wish to see given to creditors. Too often ways are sought to avoid this duty as set out by the people in Congress via the Chapter X legislation. In this proceeding one new and different way to evade this duty has been discovered. Unfortunately, thus far this new evasion scheme has succeeded. This Court must once again speak out to protect and more clearly define the congressionally declared duty owed by controlling stockholders to all creditors against this new attempted encroachment.

What is the controlling stockholders' duty as now defined by the *Pepper*[26] decision, the *Los Angeles Lumber*[26], and the *Boyd*[26], *Consolidated Motor Parts*[26], and the *Flershem*[26] holdings?

Does *Pepper* say that controlling stockholders invoking the unique sovereign power of the national government to relieve and revise their contracts with creditors in reorganization must begin and end with completely undivided openness, honesty, and fairness?

Have these stockholders measured up to the *Pepper* qualification?

Do *Los Angeles* and *Boyd* establish that the controlling stockholders must first pay all administrative expenses; second, secured creditors in full, then general creditors in full, and last (but equally pro rata) all stockholders what is left?

Have these controlling stockholders met these *Los Angeles-Boyd* requirements?

Is it necessary for the controlling stockholders to pay reasonable compensation to creditors' attorneys—who succeed in blocking the controlling stockholders' efforts

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[26]Supra, excerpts attached in Appendix One.

to coerce acceptance of an unfair plan, and who then fairly induce a fair, full payment plan—as the Second Circuit Court declared in its *Consolidated Motor Parts* decision.

Has this *Consolidated Motor Parts* requirement been met here. Has it been met in actual fact, or even comparatively when $150,000.00 in fees were paid or set for the trustee and other attorneys for the 40 per cent plan, and then, after the plan was raised 60 points to 100 per cent, no compensation of any kind was payable to the appellant attorneys for their own 60 per cent additional accomplishment. (Except the $10,000 to $26,000 now supposed to be taken from the hapless minor creditors to satisfy the 'law'.)

The only and obvious answer is: NO!

Pepper, Los Angeles-Boyd, and *Consolidated* all have been ignored. They have been ignored individually. They have been ignored even more all-together, as one whole, composite standard of conduct required of controlling stockholders in reorganization.

Why? How?

There are many partial answers. But, there is only one whole answer. This one whole answer is that the *Flershem* holding was not applied. Because this holding was not applied, equity failed; injustice occurred, and injustice will recur until this Court acts to make this duty clearly applicable in all cases of this kind.

Contests between stockholders in control and minority objecting creditors are by their nature quite one-sided. The dominant stockholders begin with the legal control and the knowledge, and the power over the assets as well

as the income in their hands. This one-sidedness grows with the uniqueness, the complexity, the size, the geographic spread, the accounting obscurity[27], the operational secretiveness, and the profitability of the operations controlled by the stockholders. Each of these factors add additional weight to the already heavily weighted advantage of the stockholders in control.

On the other hand, each passing day subtracts from each creditor's interest, courage, and capacity to fight in the naturally increasingly impotent condition each creditor finds himself in as time goes by. In a short time the fainhearted creditors no longer care, after two or three, or four years, all creditor resistance is near zeo.

The Trustee is actually powerless to protect these creditors. Even in those rare cases where the creditor's attorneys are able to fight the battle through to a plan fair and equitable on its face without the trustee's help, they and the dissenting creditors are still quite vulnerable to attack from the controlling stockholders with their unlimited, tax-free resources to finance their offense. As can be seen in this case, unless they are given the informed and concerned protection of the Courts, dissenting creditors and their attorneys cannot protect themselves from campaigns for *ex post facto* rulings, which construe a fair and equitable plan into an unfair and inequitable plan, *after its consummation* just in order to make it possible to penalize them.

Each time a lower court merely *umpires* a contest between controlling stockholders and creditors, that court

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[27]If this Court would also establish the right of creditors to coherent, consolidated accounting information, in multi-corporate reorganizations this would help immeasurably.

unwittingly turns its back on *Flershem* and in effect *hands its sword to the controlling stockholders. Flershem* demands active and informed concern to forestall the unfairness and inequity which too often and too easily results without this counterforce of concern from a just and informed court to re-balance the scales in reorganization situations.

The crux of *Flershem*[28] is the standard of special care and concern for the creditors and the duty of independent inquiry into the fairness of all actions of those in control of reorganizations and their plans which *Flershem* places upon all the lower courts in reorganizations.

Flershem insists that reorganization proceedings are special and different from ordinary cases and that reorganizations call for a considerably different, higher standard of responsibility from the lower courts. Reorganizational courts are called to actively and intelligently protect all "dissenting creditors from the condition of impotency so frequently occupied by minority stockholders" and the injusticies which too often result from the weakness of their position.

Today *Flershem* is too often forgotten, as it was in this case. Today injustice comes in where the application of *Flershem* ends. But, the problem does not end with oversight. Today *Flershem* is construed to end with protection for the dissenting creditors. By ending at this point *Flershem* even fails to adequately protect these creditors themselves.

Until *Flershem* is revitalized, updated, and extended, it is a suit of armor which fails to cover the dissenting

[28]In 54 S. Ct. 298, 302 to 306; In 290 U.S. 504, 515, 517 to 523.

creditors' arms and legs by failing to protect their attorneys as they move to protect these creditors. Until the attorneys who fight the battles are protected by the *Flershem* standard of extraordinary protection from the lower Courts, dissenting creditors are still without reasonable protection from the overwhelming power of position and maneuver of stockholders in control of their corporations.

One case in a hundred may happen where the unfairness to the dissenting creditors is so obvious and so gross that the reorganization court will disregard the pressure of the majority and the dominant stockholders, without any considerable investigatory effort and expense, or legal effort on the part of the objecting creditors and their attorneys. One case in a million may find creditors with attorneys who will shoulder the expense and effort needed to protect their clients from any fraud, inequity, or unfairness which the controlling stockholders attempt, however great or difficult to bear this effort and expense may be. However, until the comprehensive protection of the reorganization court is extended to their attorneys in keeping with *Flershem,* objecting or dissenting creditors in reorganization will find themselves with no effective defense against this fraud, inequity, and unfairness in those 99 cases out of 100 where considerable investment in professional accounting and investigation and legal preparation and action is required to expose and defeat the fraud of the controlling stockholders. Until such protection from the lower Courts is extended to their attorneys in all reorganizations, the choice of objecting or dissenting creditors lies between accepting the penalty of the loss by fraud from the controlling stockholders' actions directly or accepting the penalty of the expense of

investigation and litigation to defeat the fraud: Heads the creditors loses; Tails the creditor also loses—the only open question is, how much? To preserve the protection intended for the creditors in Chapter X reorganization proceedings, another general affirmation of the policy of congress is needed in at least three areas.

The first need is for this Court's enunciation of the very basic point that a solvent debtor may not use Chapter X as a device to coerce a creditor to accept less than the full amount of his contract obligation.

The second need is for this Court to affirm the *Consolidated Motor Parts* decision of the Second Circuit, to place beyond discretion the denial of Chapter X compensation from solvent debtors for those creditors' attorneys who must expose themselves to the inevitable and determined opposition of the controlling stockholders and the trustee to their fees, by blocking the coerced acceptance of an unfair plan and by taking the action needed to make certain that the creditors do receive equity under a fair and equitable plan.

The third and greatest need is for this Court to reaffirm the doctrine of the *Flershem Case* and to extend it. That dissenting creditors need the protection of the lower Court has been established. Now we can see that their attorneys need the Court's protection just as much. In fact, in this case we can now see that the dissenting creditors need the protection of the Courts extended to their attorneys to make the protection of the Courts effective for them.

CONCLUSION

As Sorokin[1] sees through the eyes of Petrajitzsky:[2]

> "Without law we would do nothing unpleasant or hard; we would not dare to require service of other men . . . we would not have the energy (or courage, or resources) [3]to oppose a strong man . . . to fight for our rights (or our client's rights) [3] in case of their transgression."

The mere passage of time since the *Pepper*[4] and the *Boyd*[4] and the *Los Angeles Lumber*[4] statements argues for re-statement of the *duty of care owed to creditors by controlling stockholders* to enable them to face the hard and unpleasant tasks which the performance of this duty calls for in reorganization situations. The need to strengthen the authority of the *Consolidated Motor* Parts[4] decision of the Second Circuit by its inclusion in such a re-statement is another important reason for such re-statement now.

Yet, it is the need for the enlargement of the duty of concern and inquiry for the protection of reorganization creditors by the lower Court as stated in *Flershem*[4] and *Boyd*[4] which even more urgently cries out for action today. At stake is the question of whether today creditors shall be able to dare to require the performance of the duty or to find attorneys with the energy (or courage or resources) to oppose the strong, entrenched, well-financed controlling stockholders, to fight for the rights

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[1]Sorokin, P., Contemporary Sociological Theories, p. 702, 703.

[2]Petrajitzsky, L., Theory of Law, Vol. I-II, and Introduction.

[3]Added by this writer.

[4]Supra.

of their creditor clients or their own rights under Chapter X when these rights are transgressed.

This Court can and this Court should help resolve this question at this time by a clear reaffirmation of this *Flershem-Boyd* duty of concern and inquiry upon the Courts in reorganization situations. This Court's reaffirmation should include a broadening of this duty to encompass the protection of dissenting creditors' attorneys along with their clients, in order to complete the protection given to the dissenting creditors in the reorganization of a solvent corporation.

JOHN K. CALHOUN
Individually and as Attorney for
estate of C. F. Calhoun

CERTIFICATE OF SERVICE

I, John K. Calhoun, certify that a copy of this petition has been furnished by mail to counsel of record for Charles C. Hertwig; et al, Charles Cork, Paul R. Erwin, Wallace Miller, Jr., Baldwin Martin, Jr. and George Saliba, Esquires, at their respective addresses.

This 17th day of March, 1967.

/s/ JOHN K. CALHOUN

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APPENDIX ONE

Footnote

2 *Los Angeles Lumber Co. v. Case,* 380 U.S. 186; 60 S. Ct. 1 (6):

"The Court is not a mere ministerial register of the vote of the several classes of security holders. All those interested in the estate are entitled to the Court's (both trial and appellate) protection." *(Parenthetical statement added.)*

3, 19 *Northern Pacific R.R. Co. v. Boyd,* 288 U.S. 482; 33 S. Ct. 554:

"... to the extent of their debts creditors are entitled to priority over stockholders against all the property of a corporation." *Kansas City Terminal v. Central Union Trust Co.,* 271 U.S. 445; 46 S. Ct. 549 ...

"... the stockholder's interest in the property is subordinate to the rights of the creditors. First, of secured, and then unsecured creditors." "... any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.,* 174 U.S. 674; 19 S. Ct. 827, 684 ... pp. 6 & 7.

4 *In re: Consolidated Motor Parts, Inc.,* 82 F. 2d 579 (C.A. 2)

Judge August N. Hand in his decision for the

Footnote 4 (C't'd)

court in the *Consolidated Motor Parts* case, at page 580, dealt with a situation almost parallel:

> "The appellant was an attorney for creditors and as such may be allowed compensation for 'services rendered * * * in connection with the proceeding and plan.' If he had been counsel for a creditors' committee and had rendered substantial services in preparation of a plan of reorganization, he would have come within a familiar category. That he did not represent a large proportion of the creditors and that he assisted in bringing about the plan finally adopted by objecting to the discriminatory features of the original and alternative plans did not, in our opinion, deprive him of a right to compensation. He rendered no less important services 'in connection with the * * * plan' adopted though they were performed in court in assailing the plans first proposed, rather than in working with a committee upon a plan prior to the presentation in court. In the present case he seems to have been the very person who brought about the non-discriminatory plan which finally prevailed. In doing this, we think that he rendered substantial services 'in connection with the proceeding and the plan' within the meaning of section 77B(c) (9). If he had merely done work with opposing a plan that substantially prevailed, he would hardly have been entitled to compensation from the estate."

> "(2) The services by appellant in connection with a plan of reorganization which will justify an allowance from the estate under section 77B must have contributed in some substantial way to the plan finally adopted, and in nearly all cases the decision

Footnote 4 (c't'd) of the District Court that they have not been sufficiently important or direct to deserve an allowance must be regarded as final. But here the appellant contributed to the final adoption of the plan, and the justice of the plan does not seem to be questioned. Under such circumstances, and in spite of the broad discretion lodged in the District Court, we see no reason for depriving him of all compensation for his contribution to a plan that will enable the debtor to become rehabilitated and resume business. Section 77B (c) (9), 11 U.S.C.A. 207, (c) (9), appears to empower the court to award compensation to those persons who substantially contribute to a plan of reorganization. The creditors as a whole are interested in having some workable plan adopted, and the mere fact that work which has substantially aided the plan finally approved has been performed by an attorney for creditors or stockholders owning interests adverse to some of the other parties, does not necessarily deprive him of compensation. The question is whether the work in connection with the plan has been performed in good faith and has substantially contributed to the result finally achieved."

5, 10, 19 *First National Bank of Cincinnati v. Flershem*, 290 U.S. 504; 54 S. Ct. 298, 306:

"In justifying the action taken, the Court of Appeals called the attention to the fact that the non-assenting creditors had not introduced any evidence to prove their contention that the sale should not be confirmed. In view of the undisputed facts stated above, the introduction of such evidence was not indispensable. The failure to secure an adequate

Footnote 5, 10, 19 (C'td)

price seems to have been due, not to lack of opposing evidence but to the mistaken belief that it was the duty of the court to aid in effectuating the plan of reorganization, since a very large majority of the debenture holders had assented to it. Moreover, the court stood in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce. In receivership proceedings, as was held in *National Surety Co. v. Coriell,* 289 U.S. 426, 436; 53 S. Ct. 678; 77 L. Ed. 1300, every important determination by the court calls for an informed, independent judgment; and special reasons exist for requiring adequate, trustworthy information where the jurisdiction rests wholly upon the consent of the defendant who joins in the prayers for relief. It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states."

6, 7 *Pepper v. Litton,* 308 U.S. 295; 60 S. Ct. 238.

Speaking of the obligations of managing or controlling stockholders:

"He who is in such a fiduciary position cannot serve himself first and his *cestuis* second. He cannot manipulate the affairs of the corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient pre-

Footnote 6, 7 (Cont'd)

cept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilize his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for personal advantage and gain to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation. * * *

No matter how technically legal each step in that scheme may have been, once its basic nature was uncovered, *it was the duty of the bankruptcy court in the exercise of its equity jurisdiction to undo it.* (Emphasis supplied) Otherwise, the fiduciary duties of dominant or management stockholders would go for naught; exploitation would become a substitute for justice; and equity would be perverted as an instrument for approving what it was designed to thwart."

For further discussion of the equitable rights of creditors against self-dealing officers, directors and stockholders, see *In Re. V. Loewer's Gamrinus Brewery Co.*, 167 F. 2d 318 (2d Cir.); *Goldie v. Cox*, 130 F. 2d 695;

Footnote

Arnold v. Phillips, 117 F. 2d 497 (5th Cir.) and for a very recent case, *Bankers Life & Casualty Co. v. Kirtley,* 338 F. 2d 1006 (8th Cir., 1964).

12. *Security Mortgage Co. v. Powers,* 278 U.S. 149; 49 S. Ct. 84:

"(Under Georgia law) The contingent obligation to pay attorneys fees was a part of the original transaction. The consideration was not the attorney's services, but the $90,000 advanced by the (lender) . . ."

"An agreement to pay attorneys fees in promisory notes is in the nature of liquid damages which inures to benefit of the plaintiff, and is not a provision for the benefit of the attorney at law who brings suit on the notes to recover . . . principal interest and attorneys fees."
Spence v. Phillips, 172 Ga. 782 (4)

"Where a promissory note provides for the payment by the maker of principal, interest, and attorney fees, the attorney fees are part of the principal debt.
Evans v. Atlantic National Bank, 147 Ga. 621 (2)

"The stipulation in the note for the payment of attorneys fees and presumably this suit counting for attorneys fees is proceeding solely for the benefit of plaintiff." (lender)
Carson v. Blair, 31 Ga. App. 60 (2).

"Obligations to pay attorneys fees upon any note . . . in addition to interest . . . shall be valid and enforceable and collectible as part of the debt . . ."
Code of Georgia, 20-506.

Footnote

13 *Consolidated Rock Products v. DuBois,*
312 U.S. 610; 61 S. Ct. 675:

"... 'any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights' of creditors 'comes within judicial denunciation.' *Louisville Trust Co. v. Louisville, New Albany & Chicago Ry. Co.,* 174 U.S. 674, 684; 19 S. Ct. 827, 830; 43 L. Ed. 1130. And we indicated in *Case v. Los Angeles Lumber Products Co.,* supra, that that rule was not satisfied even though the 'relative priorities' of creditors and stockholders were maintained. (308 U.S. pages 119, 120; 60 S. Ct. page 9, 84 L. Ed. 110)."

"The instant plan runs afoul of that principle. In the first place, no provision is made for the accrued interest on the bonds. This interest is entitled to the same priority as the principal."

The very purpose of the Absolute Priority Rule is to prevent the stockholders of a corporation with assets from using a reorganization to wash out the creditors at a fraction of their claims, and then take back the corporation and remaining assets, *sans* creditors.

22 *Irvin v. Life of Tennessee,*
204 Ga. 582.

In the Irvin case all the insurance companies did was fail to perform the task of collecting on collateral which they held. In this case these stockholders *removed* the collateral assets. The Georgia Supreme Court would not let the insurance company charge Irvin with the expense resulting from their mere neglect; will this court let these stockholders

Footnote
22 (c'td) charge appellants (by failing to reimburse appellants) the expenses resulting from the stockholders' fraudulent withdrawals and their further continued, wilful wrong in failing to return these assets which are in effect collateral for all the creditors' claims?

> ". . . It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience . . ."

Without consideration, these stockholders have received the Calhoun heirs' 5/110 right to all of the Den-Nap assets by appellants' mistaken reliance upon their full and truthful disclosure of the facts concerning the condition of Den-Nap at the time of the Reorganization. To qualify for equity it would appear that their first responsibility would be to restore to the Calhoun Estate's minor heirs that 5/110 of all the Den-Nap assets.

> ". . . when applying for relief in court of equity, (everyone) is as much bound to do equity as is a private litigant . . ."
> *Lacy v. United States,* 216 F. 2d 233, 234.

(See also, Appellants Brief on Extraordinary Motion, in the Circuit Court pages 39-46. Record, separately certified and bound.)

One is forced to ask, can any other composition or contract come out of a Chapter X proceeding besides the written Chapter X Plan itself?

May separate and conflicting *unwritten* contracts be

Footnote 22 (C'td) enforced by the controlling stockholders when the plan is their own Private Purchase Plan of Composion-with-Creditors?

Or, can controlling stockholders vary their written Chapter X Plan of composition at will?

We believe under Chapter X law and under the general Common Law of Compositions adhered to in Georgia, all the valid and controlling agreements must be written into the Plan of Composition to be enforceable when contrary to the express provisions of that plan.

From the statute it would appear that under Chapter X the Plan is the ultimate arbiter of all rights and duties of creditors and stockholders. 11 U.S.C.A. § 623.

The same result will obtain for any composition under Common Law.

> "If a debtor misrepresents or suppresses any material fact in the statement of his affairs, either as to the amount of his property or the amount of his indebtedness, the composition agreement is void."
>
> *Woodruff & Company v. Saul,* 70 Ga. 271 (2).
>
> "The rules which pertain to 'composition of debts' by debtors in failing circumstances are distinct from those which relate to accord and satisfaction."
>
> *Brown Shoe Co. v. Rowell,* 187 So. 498 (2).
>
> "Composition (also) differs from ... Compromise and Settlement ... ditto *15 C.J.S. Compositions § 3, p. 644, C.J.S. § 2, 672.*"
>
> "A composition with creditors contemplates that all who participate shall do so on equal terms ... (per their respective classifications.)"
>
> *Brown Shoe Co. v. Rowell,* 187 So. 498 (3).

Footnote
22 (c'td) See also, *Saul v. Buck Hefflebower & Neer*, 72 Ga. 254; *Von Eberstein v. Standard Oil Co. of Kentucky*, 41 Ga. App. 770 (1930).

"Any plan to be sufficient should be definite . . . before being submitted for acceptance in order that creditors . . . may be apprised of their exact standing if the plan is accepted . . ."

Down Investment Assn. v. Boston Management Bldg., Inc., D. C. A. 1 (1930), 81 F. 2d 314 (3): "Corporate reorganization plan under amendment to Bankruptcy Act is in substance a composition between creditors and debtors and is merely extension of principal of composition agreement of original Bankruptcy Act . . ."

and see also, Headnote 4: (at page 318)

"Agreement to be binding must be so definite that promises and performances to be rendered by each party are reasonably certain."

If in fact the intent to take away appellants' Chapter X fee was present, it was the stockholders' duty to put this provision in their private purchase-composition plan when they reduced it to writing, and before it was submitted to the creditors for their approval. The plan having failed to set out any limitations on their rights, appellants' clients and their attorneys, not having understood or agreed to any waiver, are entitled to equal treatment with all others who contributed to this Estate and to the composition plan, and who in fact were granted and paid their fair attorneys' fees in accordance with the standards set by Chapter X.

EXHIBIT A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN K. CALHOUN, individually and as attorney for the Estate of C. F. Calhoun,

Appellant,

versus

CHARLES C. HERTWIG, Trustee, Et Al.

Appellee.

No. 23347

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days; the stay to continue in force until the final disposiiton of the case by the Supreme Court, provided that within 90 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from the

date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 31st day of October, 1966.

/s/ Griffin B. Bell
United States Circuit Judge

(ORIGINAL FILED – NOVEMBER 2, 1966)

EXHIBIT B

October 20, 1966

Re:

No. 23347—John K. Calhoun, etc.
—vs—Charles C. Hertwig
Trustee, Et Al

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

/s/ EDWARD W. WADSWORTH

EDWARD W. WADSWORTH,
Clerk

Mr. Charles E. Watkins, Jr.
Attorney at Law
Atlanta, Georgia

Mr. Wallace Miller, Jr.
Attorney at Law
Macon, Georgia

Mr. Charles M. Cork
Attorney at Law
Macon, Georgia

Mr. Paul R. Ervin
Attorney at Law
Charlotte, N. C.

Mr. T. Baldwin Martin, Jr.
Attorney at Law
Macon, Georgia

(Filed U. S. Court of Appeals, August 9, 1966.
Edward W. Wadsworth, Clerk)

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 23347

JOHN K. CALHOUN, individually and
as attorney for the Estate of C. F. Calhoun

Appellant

Versus

CHARLES C. HERTWIG, Trustee, Et Al

Appellees

Appeal from the United States District Court for
the Middle District of Georgia

Before TUTTLE, Chief Judge, BELL, Circuit Judge and KILKENNY, District Judge.

BY THE COURT:—

IT IS ORDERED that the motion of Appellant to accept his petition for rehearing and brief in support in its present form and to accept same out of time be, and the same is hereby GRANTED. The motion for rehearing is DENIED.

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1965

NO. 23347

D. C. Docket Nos. 8286, 8287 and 8288—Bankruptcy

JOHN K. CALHOUN, individually and as attorney for the Estate of C. F. Calhoun,

Appellant,

versus

CHARLES C. HERTWIG, Trustee, Et Al,

Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge and BELL, Circuit Judge and KILKENNY,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellant, John K. Calhoun, individually and as attorney for the Estate of C. F. Calhoun, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 28, 1966

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*Of Portland, Oregon, sitting by designation.

Issued as Mandate:

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MAR 14 1967
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SUPREME COURT, U.S.

EXHIBIT D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23347

JOHN K. CALHOUN, individually and as attorney for the Estate of C. F. Calhoun,

Appellant,

versus

CHARLES C. HERTWIG, Trustee, ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Georgia.

(June 28, 1966.)

Before TUTTLE, Chief Judge and BELL, Circuit Judge and KILKENNY,* District Judge.

BELL, Circuit Judge: Appellants were the attorneys for the estate of C. F. Calhoun, a creditor involved in the reorganization under Chapter X of the Bankruptcy Act of Den-Nap Electric Mold Co. and two related corporations,

---

* Of Portland, Oregon, sitting by designation.

Poplar Foundries, Inc. and Precision Recapping Equipment Co. They petitioned the District Court for $11,367.60 in attorneys' fees and $873.04 expenses to which they claim that they are entitled for services rendered in the reorganization proceedings. This appeal is taken under § 250 of the Bankruptcy Act, 11 USCA, § 650, from an order denying their claim.

The facts are that these corporations applied for relief in 1961 under Chapter X of the Bankruptcy Act. The dominant figures in each of the corporations were the majority stockholders who were also the chief executive officers. The three corporations were treated as one in the reorganization proceedings so as to eliminate any problem regarding inter-corporate debts or other obligations or arrangements. Appellants, Messrs. Calhoun, Russell and Watkins, participated in the proceedings as counsel for the estate of C. F. Calhoun, the father of one of appellants. Mr. Calhoun was a stockholder in and a creditor of Den-Nap by reason of its purchase of certain patent rights and equipment from him. The exact amount of his claim was disputed as we shall see. The creditor corporations were operated by a trustee from 1961 until the date of the completed reorganization in 1965.

On February 12, 1965, a meeting was held to discuss an initial reorganization plan suggested by the debtors. This plan provided for payment to the general creditors of forty cents on the dollar, together with full payment of all secured and priority claims and costs of administration. Substantially all of the Calhoun claim was in the forty per cent category. The trustee and all creditors

except the Calhoun estate were willing to accept the plan. Appellants, as the Calhoun attorneys, considered the plan unfair and refused to accept it. They then contacted numerous companies in an effort to find a purchaser for the debtors' assets so as to make possible a better plan. They were successful in finding a purchaser, the Super Mold Corporation of California. This company in fact came to Macon and inspected the properties on the very next day, February 13, 1965. A sale to Super Mold would have made possible a reorganization plan which would more nearly satisfy the claims of the creditors.

Appellants drafted and filed a plan on March 22, 1965, which was based on the increased assets from the sale to Super Mold Corporation. The creditors' committee submitted their own revised plan on March 26, 1965. On March 30, 1965, a hearing was held at which time the court had all the submitted plans before it. After explanation of the three plans the court adjourned until the afternoon of the same day. This recess was taken for the purpose of giving the interested parties an opportunity to reach a mutually satisfactory agreement. The difficulty in agreeing on a plan stemmed from the fact that the amount of the Calhoun claim was disputed. The disputed amount was approximately $26,000 which was largely made up of interest accruing since the initiation of the reorganization proceedings in 1961 plus attorneys' fees on the accelerated portions of certain notes. Finally, an agreement was reached which provided that all of the other general creditors would voluntarily reduce their claims by eleven per cent in order to raise the $26,000

which the Calhoun estate claimed and thus pay the Calhoun claim in full.

When the hearing was reconvened in the afternoon, the compromise agreement was explained; and the parties agreed to submit to the court a written plan embodying the features of it. At this time the following colloquy took place between the court and Mr. Calhoun, counsel for his father's estate:

> "THE COURT: The other thing I want to be sure of, if this plan goes through, Mr. Calhoun, every matter concerning which you have suggested any issue and every question which you have raised by any of the pleadings which you have filed in connection with the matter or any which could have been raised which you have not raised, will be terminated and disposed of; is that understood?
>
> "MR. CALHOUN: Your Honor, I'm happy to be bound by the agreement and upon the approval of a plan which provides $98,724.15 in cash, everything that we have in this proceeding will be dismissed.
>
> "THE COURT: Well, when you say 'in cash', you mean at the same time all the other creditors are paid?
>
> "MR. CALHOUN: At the same time as the other creditors.
>
> "THE COURT: At the same time all the other creditors are paid.

"MR. CALHOUN: Yes sir, and yet, we wish to reserve our right to dismiss until that date.

"THE COURT: Oh, yes, but the plan, when we talk about 'the plan', when the plan is approved, if the Court approves it, that terminates every question which you have raised or could have raised.

"MR. CALHOUN: Yes, sir, I would rather state it that when a distribution is made under the plan, that settles everything, terminates everything.

"THE COURT: All right, I wanted to be sure . . ."

Counsel for the debtors objected to this payment to the Calhoun estate on the ground of unjust enrichment but counsel for the trustee and also for the creditors' committee recommended that it be approved. Counsel for the creditors' committee stated that he acceded to avoid further delay and to recognize the efforts of counsel for the Calhoun estate in finding Super Mold and thus bringing about a better payment plan for the creditors. The plan was approved by the court, unanimously accepted by the creditors and confirmed by the court.

At the time of this colloquy between the court and Mr. Calhoun, the proposed plan of reorganization submitted by Mr. Calhoun, as executor of his father's estate and as counsel for the estate, was before the court. It contemplated a purchase of the stock of the reorganized

corporation by Super Mold Corporation, and provided for fees as follows:

> "Subject to the agreement of the successful purchaser and/or the order of the Court, the Trustee shall deliver to the authors of this Plan such amount of the Class A Common Stock in the Reorganized Corporation as the parties may agree upon as the reasonable fee for the work done in connection with the prosecution of the Petition to Confirm the Re-Consolidation of all the Assets and Eliminate the Claims of Dennis and Mattox in this proceeding, and in connection with this Plan of Reorganization for the three corporations."

The proposed plan which included this suggested fee arrangement was filed on March 22, 1965. On March 9, 1965 a petition had been filed by Mr. Calhoun to set aside certain claims of the majority stockholders against the corporation and the suggested plan of reorganization was spelled out to some extent in that pleading. A claim for attorneys' fees to be payable in stock was asserted therein. Moreover, on July 3, 1964, Mr. Calhoun advised counsel for the trustee in writing that counsel for the Calhoun estate were entitled to attorneys' fees to the extent that they had contributed to the reorganization. Counsel for the trustee replied on July 7, 1964 that any claim for attorneys' fees which they might make should be submitted to the court. Thus, there was no doubt that these lawyers had fees in mind at the time of the colloquy with the court. Nevertheless, on April 29, 1965

appellants applied for attorneys' fees and costs. A hearing on their application was held on May 4, 1965, with the result that the application was denied.

The court gave two reasons for the denial. First, the court deemed the question foreclosed by the foregoing colloquy; and second, the claim was denied as a matter of law on the ground that the services rendered had been, when considered in light of their primary purpose of representing their client, ". . . too remote, unintended and incidental to the primary purpose . . . to be susceptible of valuation . . . or compensable by allowance in this proceeding."

We think the District Court erred in finding that as a matter of law appellants' services were too remote and incidental to be compensable. In being the only objecting party to the first proposed plan, and in later making possible a much more desirable plan through negotiation with Super Mold Corporation, appellants benefited not only their own client but also the other creditors. The record conclusively shows that they did substantially contribute to the plan of reorganization. As was stated in *In Re Consolidated Motor Parts, Inc.*, 2 Cir., 1936, 85 F.2d 579, ". . . the question is whether the work in connection with the plan has been performed in good faith and has substantially contributed to the result finally achieved."

We hold, however, that the order of the District Court denying the award of attorneys' fees and costs was correct and should be affirmed. The agreed settlement, as stated

above, was made possible by the fact that the general creditors accepted an eleven per cent reduction of their claims in order to provide the additional $26,000 on the Calhoun estate claim. Appellants contend that this sum was rightfully due and should not militate against their present claim. However, it appears that the general creditors made the concession in part in recognition of the contribution made by appellants in procuring the Super Mold bid. And it is worthy of note that the $26,000 in dispute, based on post Chapter X interest as well as attorneys' fees, included, as near as can be determined from the record, some $10,000 in attorneys' fees.

The approach which we take to this matter is stated in 6A Collier, Bankruptcy, § 13.02 at pp. 904-908, as follows:

> "In determining the allowances to be made, Chapter X . . . confers upon the judge a broad discretion, with which an appellate court will not interfere except for an abuse thereof or an erroneous application of the law . . . . The mere fact, however, that a claimant is a person to whom Chapter X permits compensation or reimbursement to be given does not mean that the claimant must be accorded an allowance. Nor does participation in the proceedings, however rightfully, create any absolute right to compensation or reimbursement. . . .
>
> * * *
>
> "since the circumstances surrounding the particular claim will govern, it is impossible, of course, to lay down any hard and fast rules which

will fit all cases . . . . Nevertheless, the judge should endeavor to exercise fairly the discretion lodged in him with the double purpose of doing equity to the distressed debtor and its security holders and at the same time rewarding the proper activities of those participating in the proceedings."

On the face of things it would appear that appellants did produce such benefit to the estate as would bring them within the fee allowance section, 11 USCA, § 643,[1] especially in light of the liberal application of the test ". . . to insure the vigorous representation of all security holders and the protection of minority groups." 6A Collier, Bankruptcy, § 13.02 at pp. 914-915. See also § 13.12, p. 974. It is objective of Chapter X to encourage the participation of all interests and this should be kept in mind in attempting to draw a line between services rendered in connection with the reorganization broadly and those strictly in the interest of a particular claimant.

We hold, however, that the District Court did not abuse its discretion in denying the application of appellants for

---

[1] 11 USCA, § 643:

"The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto."

fees and costs when we consider the fact of the extra payment of $26,000 and the representations of appellants to the court at the time. Mr. Calhoun had in mind claiming a fee for services rendered in the reorganization. He was the leading counsel for his group. He had corresponded with counsel for the trustee relative to such a fee. He had claimed a fee in two pleadings which were before the court at the time. He thus was aware of his right to claim a fee for himself and his co-counsel, and had full opportunity to assert or reserve such a claim when the matter of the settlement was before the court. He did neither. The District Court did not err in holding them to the position Mr. Calhoun took at that time, especially in light of the fact of the attorneys' fees which they received as a part of the disputed $26,000 payment.

AFFIRMED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

(Filed at 8:45 A.M., May 5, 1965.

John P. Cowart, Clerk, U. S. District Court)

EXHIBIT E

IN THE DISTRICT COURT OF THE UNITED STATES, FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC. and PRECISION RECAPPING EQUIPMENT COMPANY	In Proceedings for Reorganization under Chapter X, Bankruptcy Act. Nos. 8286, 8287 and 8288

ORDER OF COURT AFTER HEARING ON TRUSTEE'S PETITION IN AID OF CONSUMMATION OF THE PLAN

After hearing pursuant to previous notice on the Trustee's petition in aid of consummation of the plan,

IT IS ORDERED that:

(1) Charles C. Hertwig, Trustee, shall not convey title to any of the assets of the debtor corporations, or either of them, until after he has in hand, or simultaneously with his having in hand, the sum of $535,000.00, to be utilized by him in consummation of said plan, and which sum shall, by said Trustee, be deposited in an account pursuant to said plan and be disbursed only upon order of the Court.

(2) Upon Charles C. Hertwig having in hand such cash sum, or simultaneously therewith, he is hereby ordered and directed to:

(a) Execute all instruments and conveyances of all kinds, as set forth in the plan, and to take such other steps and perform such other acts as the plan embraces and as are necessary for its consummation.

(b) Pay in full the creditors of Precision Recapping Equipment Company listed in his petition for an order in aid of consummation of the plan, totaling $15,306.63, other than the amount shown on this company's books due Eastern Air Lines in the amount of $709.72 (it appearing this amount being shown on the company's books in error, and no claim therefor was filed.)

(c) Pay in full the tax claims against Poplar Foundries, Inc. and Den-Nap Electric Mold Company, shown in said petition as totaling $30,439.36; and pay in full the claim of Fickling & Walker, Inc. in the amount of $30,000 principal and interest at the rate of 8% per annum until date (the same amounting to $41,400, principal and interest, as of May 25, 1965); and pay in full the claim of the Calhoun Estate in the amount of $98,724.15, upon the Calhoun Estate performing the acts required of it under the plan in consideration of such payment.

(d) Pay the other general creditors of Poplar Foundries, Inc. and Den-Nap Electric Mold Company the amount of their claims according to the plan, less their proportionate part of $26,424.15. (This amount is shown in said petition as $215,374.33, less $26,424.15, leaving $188,905.18, or 87.73% of the claims to be paid.)

(e) Upon payment of all such claims, whether the

same is required in the plan or contemplated under the law, the Trustee may demand such receipts, releases, acquittances, satisfactions of record, and other acts to be done and accomplished by the recipients of the funds so paid.

(f) The remainder of the funds in the hands of the Trustee shall remain on deposit in said account, subject to disbursement only by further order of the Court.

So ordered, this 4th day of May, 1965.

J. Robert Elliott
United States District Judge

I hereby certify that I have this date mailed one copy of the within to District Director of Internal Revenue, Atlanta, Ga., one copy to Secretary of the Treasury, Washington, D. C., and two copies to Securities and Exchange Commission, Washington, D. C.

At Macon, Ga. this May 5, 1965.

Lucille H. Robinson
Deputy Clerk

(Filed at 10:30 A.M., Dec. 21, 1964. John P. Cowart, Clerk, U. S. District Court.)

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC., AND PRECISION RECAPPING EQUIPMENT COMPANY, Debtors	In Proceedings for Reorganization Nos. 8286 8287 8288

ORDER ON APPLICATION OF CHARLES M. CORK AND LOUIS REGENSTEIN, JR., FOR COMPENSATION

The Creditors Committee in the above cases through its counsel having orally moved at a hearing held in Columbus, Georgia on November 4, 1964, for an early assignment and determination of the application of Charles M. Cork and Louis R. Regenstein, Jr., for the allowance of reasonable compensation for services rendered and for reimbursement of proper costs and expenses incurred by them as special counsel for Charles C. Hertwig, Trustee of the above named Debtors, the same was by order of this Court assigned for a hearing in Macon, Georgia on December 10, 1964, the hearing to be held on said application and objections thereto

filed by the Creditors Committee. The hearing was duly held pursuant to said assignment. Evidence was presented and arguments of counsel were heard and the same considered by the Court.

The said attorneys, Charles M. Cork and Louis Regenstein, Jr., were appointed to represent the Trustee in opposing claims of the United States for alleged income tax deficiencies for the years 1951 through 1960. As a result of said services the claim of the United States in the amount of $1,710,223.77 was disallowed in its entirety. This claim consisted of the principal amount of $918,639.04, interest accrued prior to the filing of the petition under the Bankruptcy Act in the amount of $327,400.03, and penalties of $464,184.70 under Section 293 (b) of the Internal Revenue Code of 1939 and Section 6653 (b) of the 1954 Code. As a further result, a net operating loss carry-forward from the years involved in the claim in the aggregate amount of $574,015.91 was established and a refund of Federal income taxes theretofore paid in the amount of $42,596.80, plus interest, was obtained. The denial of the claim of the United States disposed of a corresponding liability for income taxes to the State of Georgia in the amount of approximately $150,000.00. Furthermore, the principles established in this matter have saved these companies, and will in the future save these companies substantial additional income taxes in each year subsequent to 1960.

Although the claim of the United States was directed against Den-Nap Electric Mold Company, the assets of Poplar Foundries, Inc., and of Precision Recapping Equipment Company would have also been subject to the claim. (Emphasis added)

Had the United States succeeded in establishing the

validity of its claim substantially all of the assets of these Debtors would have been taken by virtue of the priority status of the United States' claim, except for amounts owed to secured creditors.

By order of this Court the value of these Debtors' estates has been recently appraised by Mr. Thomas H. Hall, III, M.A.I., C.R.E. Mr. Hall finds that if inter-company accounts are eliminated and if the claims of two stockholders, C. O. Dennis and Zeb Mattox, are eliminated, each of the Debtors is now solvent and on a consolidated basis the Debtors are solvent. The appraisal places a net value upon the consolidated companies of $1,238,500.00, after the deduction of all liabilities except the liabilities to the aforesaid two stockholders.

The financial statements of these companies similarly show the companies to be solvent, both individually and consolidated, after the elimination of inter-company indebtedness and the claims of the above stockholders. The latest such financial statement made by an independent certified public accountant for the Trustee with the permission of the Court and prepared as of June 30, 1964, shows gross consolidated assets of $2,076,215.53 and gross consolidated liabilities of $612,550.60 (after eliminating amounts owed to the above two stockholders). Of the aforesaid liabilities approximately $100,000.00 represents secured creditors and $512,550.60 general creditors. In the asset figure, patents owned by Precision are included at book value after amortization, $568,558.63, and the stock of Den-Air, Inc., a wholly owned subsidiary of Precision, at approximately $119,000.00. These patents were appraised by Mr. Hall for $388,000.00 and the stock of Den-Air, Inc. was appraised by him at $375,000.00.

The results obtained by the petitioning attorneys required great skill, effort, and time. The assets of the debtors were preserved and augmented and it is highly probable that the general creditors will ultimately receive a substantial part of their claims.

In the opinion of the Court, were the subject Debtors solvent going concerns a fee to the applicants of not less than 15% of the amounts saved would be reasonable compensation but in view of the financial condition of the Debtors the Court will allow only 7½%. Since the amount of the net assets, as appraised by Mr. Hall, $1,238,500.00, is less than the amount of taxes, penalties and pre-reorganization interest, the Court will allow only 7½% of the amount of Mr. Hall's appraisal. Accordingly, it is determined that the sum of $92,887.50 is reasonable compensation for all services rendered by said petitioning attorneys in connection with said tax claims and that $32.42 is the amount of proper costs and expenses incurred by them in these proceedings and remaining unreimbursed. The foregoing amounts are hereby allowed as reasonable compensation for services rendered and as reimbursement of proper costs and expenses. Charles C. Hertwig, Trustee of said Debtors, is directed to make payment of such allowance.

IT IS SO ORDERED this 18th day of December, 1964.

/s/ J. ROBERT ELLIOTT

J. ROBERT ELLIOTT
United States District Judge

(Filed at 8:30 A.M., Jan. 27, 1965. John P. Cowart, Clerk, U. S. District Court.)

EXHIBIT F (Cont.)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC., AND PRECISION RECAPPING EQUIPMENT COMPANY, Debtors	In Proceedings for Reorganization Nos. 8286 8287 8288

ORDER ON MOTION TO AMEND AND MODIFY THE COURT'S JUDGMENT FIXING ATTORNEYS' FEES FOR CHARLES M. CORK AND LOUIS REGENSTEIN, JR., OR IN THE ALTERNATIVE FOR A NEW TRIAL

Upon motion of the Creditors Committee in the above cases this Court on December 10, 1964 heard evidence and argument of counsel pertinent to a determination of the application of Charles M. Cork and Louis Regenstein, Jr., for the allowance of reasonable compensation for services rendered and for reimbursement of proper costs and expenses incurred by them as special counsel for Charles C. Hertwig, Trustee of the above named debtors. Subsequently, on December 18, 1964, this Court entered its order allowing certain amounts as reasonable

compensation to said attorneys for services rendered and as reimbursement of proper costs and expenses. Thereafter, on December 24, 1964, the Trustee and the Creditors Committee filed their motions suggesting that the Court amend and modify its order and judgment of December 18, 1964, or, in the alternative, that a new trial of the matter be granted. All parties concerned were invited by the Court to submit memoranda in support of or in opposition to said motion and the Court has now had the benefit of the views of the parties and their counsel as set forth in such memoranda.

The Court has given careful consideration to all of the contentions made with respect to the Court's original order of December 18, 1964 and the Court is not persuaded that there should be any amendment, revision or modification of said original order, and further, that no constructive purpose would be served by the grant of a new trial with respect to the matter at issue. Accordingly, the opinion of the Court heretofore expressed is adhered to and the motion to amend the Court's order and judgment entered December 18, 1964, or in the alternative, for the grant of a new trial, is hereby denied.

IT IS SO ORDERED this 26th day of January, 1965.

/s/ J. ROBERT ELLIOTT

J. ROBERT ELLIOTT
United States District Judge

(Filed at 9:00 A.M., Jul. 15, 1965. John P. Cowart, Clerk, U. S. District Court.)

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of: DEN-NAP ELECTRIC MOLD COMPANY, POPLAR FOUNDRIES, INC. AND PRECISION RECAPPING EQUIPMENT COMPANY	In Proceedings for Reorganization under Chapter X, Bankruptcy Act Nos. 8286, 8287 and 8288

MEMORANDUM OPINION AND ORDER ON APPLICATION OF MESSRS. RUSSELL, WATKINS AND CALHOUN FOR ALLOWANCE OF ATTORNEY'S FEES AND EXPENSES

Petitioners are attorneys for the Estate of C. F. Calhoun, one of the largest creditors of Den-Nap Electric Mold Company. Den-Nap is one of the debtors in a combined corporate reorganization proceeding instituted in this Court in February, 1961, under Chapter X of the Bankruptcy Act of the United States, said proceeding also relating to Poplar Foundries, Inc., and Precision Recapping Equipment Company. Petitioners seek an allowance, as calculated in their Amended Application, for $11,367.60 in attorney's fees and $873.04 as reimburse-

ment for costs incurred in connection with activities Petitioners contend should be compensable in connection with this proceeding. A hearing was held on Petitioners' application in Macon, Georgia, on May 4, 1965, at which time this Court also confirmed the reorganization plan which had been previously approved by substantially more than the required creditors of the three corporations, which plan envisioned the payment in full of administrative expenses and creditor's claims as proved in the plan.

In support of their application for allowance, Petitioners offered affidavits of two practitioners of the Atlanta, Georgia, Bar as to the value of their services. One of these affidavits estimated the value of Petitioners' services at from $40,000.00 to $50,000.00, and the second at from $45,000.00 to $75,000.00. In substance, Petitioners claim that it was through their efforts that the corporation which they contend to be the most valuable (Precision) was placed by its stockholders into the reorganization proceeding in 1961 only under threat of legal proceedings designed to accomplish that end; that had it not been for Petitioners a reorganization plan would have been approved in February, 1965, which would have paid creditors forty cents on the dollar, whereas, Petitioners contend that through their efforts, a competitor of the debtor corporations was brought in as an active bidder, offering to pay $400,000.00 for the assets of the debtor corporations, which amount Petitioners contend was sufficient to pay all administrative expenses and creditors in full; and that the presence of this outside bidder resulted in the debtor corporations submitting an amended reorganization plan which paid administrative expenses and creditors in full.

Attorneys for the debtor corporations filed objections to Petitioners' application, denying its allegations. Upon the hearing, attorneys for the debtor corporations, the purchaser under the reorganization plan, the creditors committee, one of the individual creditors, and the Trustee spoke in opposition to the allowance. Briefs were filed by the attorneys for the debtor corporation and the purchaser in support of their position. Opposition to the making of an allowance was based on two grounds: (1) that Petitioners were estopped from seeking such an allowance by virtue of certain statements made by one of the Petitioners to this Court while sitting in Columbus, Georgia on March 30, 1965, at which time the reorganization plan was amended through negotiations and approved by this Court, and, (2) that the Petitioners had failed to prove the allegations of their application and were not entitled to an allowance as a matter of law.

Based upon uncontroverted statements by interested parties made to this Court both on March 30th and upon the hearing of this petition on May 4th, the following emerges as to what transpired on the former date: the debtor corporations had proposed to amend their reorganization plan to pay creditors in full the amount of their respective claims as recognized by the Trustee, there being a difference of some $26,000.00 between the amount recognized by the Trustee as owing to Calhoun's Estate ($72,300.00) and the amount claimed by said Estate as owing to it ($98,451.15). The difference in amount was primarily composed of items the legitimacy of which were in dispute, *i.e.*, attorneys fees on the principal balance of the claim, exclusive of such fees on pre-Chapter X judgments, post-Chapter X interest and

the crediting of payments made on the Estate's claim during the reorganization period. The attorneys for the creditors committee thereupon offered to pay to the Calhoun Estate from funds otherwise available to general creditors this $26,000.00 difference in an effort to prevent an appeal by Calhoun's Estate from an approval and confirmation of the plan and to recognize the efforts made by Petitioners in this proceeding. The attorneys for the creditors committee and other interested parties feared that an appeal and its resulting delay in consummating any plan would greatly lessen the possibility of any disposition of the debtors' assets other than by liquidation sale, which would result in a substantial reduction in funds available for payment of creditor's claims. Petitioners, as attorneys for the Calhoun Estate, accepted the creditors committee proposal and an outline of the amended plan was thereupon announced to this Court. Because of the voluminous pleadings filed and the various positions taken by the Calhoun Estate in this proceeding, this Court of its own motion then made careful and *diligent inquiry* of Petitioners *whether payment to the Calhoun Estate pursuant to the reorganization plan as then formulated would resolve all matters which had been raised or could have been raised by Petitioners in this proceeding.* A transcript of the colloquy between the Court and Mr. John K. Calhoun, chief attorney for the Calhoun Estate and son of the deceased, is appended hereto as Appendix A.

I.

On the threshold, the Court rules that Petitioners are barred from seeking an allowance for services allegedly rendered the debtors' estate as a result of the colloquy

between this Court and Mr. Calhoun in Columbus, Georgia on March 30, 1965. At the May 4, 1965 hearing Petitioners sought to minimize the effect of Mr. Calhoun's statement, contending that he had not had the matter of attorneys fees in mind when making his statement. Whatever Mr. Calhoun's state of mind at that time may have been, the Court and all other interested parties had regarded the procession of pleadings filed by Petitioners to be at an end and were surprised when a later petition was filed requesting the allowance now sought. The Court's interrogation of Mr. Calhoun was made against a background of voluminous pleadings filed and various positions asserted, including a proposed reorganization plan filed by Petitioners on March 22, 1965, which plan contained a provision that the authors of the plan would receive stock in the reorganized corporation as compensation for their services. This plan of March 22nd was filed in expansion of an outline of said plan as set forth in a petition filed on March 9, 1965, which earlier petition sought to consolidate the assets of the three debtor corporations to pursue various alleged remedies against the former stockholders of the debtor corporations, and outlined a reorganization plan, including an award of stock in the reorganized corporation for Petitioners. Petitioners having so specifically referred to their desire for an allowance in pleadings previously filed in this proceeding, the Court holds that they are now barred from asserting a claim for such an allowance by virtue of their statements made in open court on March 30, 1965.

II.

The Court further holds that Petitioners are not en-

titled, as a matter of law, to compensation out of the assets of the bankrupt estate.

Under § 242 of the Bankruptcy Act *(11 U.S.C. § 642)*, allowances and reimbursement for costs and expenses may be made to parties in interest for services rendered and costs and expenses incurred in connection with the administration of an estate in a Chapter X proceeding or in connection with a plan approved by the Court. Alternatively, under § 243 of the Bankruptcy Act *(11 U.S.C. § 643)*, compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and their attorneys may be allowed in connection with the submission by them of suggestions for a plan or proposals in the form of a plan, or in connection with the administration of the estate only if those services contributed to the plan confirmed or to the refusal of confirmation of a plan or were beneficial in the administration of the Estate.

> "The mere fact.... that a claimant is a person to whom Chapter X permits compensation or reimbursement to be given does not mean that the claimant *must* be accorded an allowance. Nor does participation in the proceedings, however rightfully, create any absolute right to compensation or reimbursement."
>
> *6 Collier, Bankruptcy, § 13.02 at p. 4502 (14th Ed. 1964).*

The ultimate test under the statute is whether the services performed *benefited* the Estate, Id. at p. 4509, a question which must be determined by examination of the particular factual situation under which an application for allowance arises.

Did Petitioners' activities benefit the bankrupt estate? Neither Petitioners nor their clients were involved in the administration of the bankrupt estate. Petitioners' appearance in this proceeding was in their capacity as attorneys for the largest creditor of one of the debtor corporations. *It does, however, appear uncontroverted that Petitioners were the first parties in interest to contact the officials of Super Mold Corporation, of Lodi, California, a principal competitor of the debtor corporations, with reference to the possibility of purchasing either debtors' going business or the assets thereof.* However, this contact was made by Petitioners at a time when the interests of their client, the Calhoun Estate, were in a particularly precarious position. Petitioners then had notice of a petition filed by the Trustee requesting that this Court value certain engraving machines on which the Estate had a bond to secure title as security for its claim. Petitioners had always contended that the Estate was a secured creditor entitled to, in their words as set forth in a letter to this Court dated January 26, 1965, "the very first priority". The debtors' plan sought to value the Estate's security at $2,500.00. Petitioners, on the other hand, in a petition mailed to this Court on January 26, 1965, but never filed, contended that the Estate's security was of a value far in excess of this amount, if not in excess of its claim, and that the Estate was entitled to a fifteen month delay in all matters connected with this proceeding, during which time the Estate would have an opportunity to establish the value of its security. Petitioners were notified of a creditors meeting to be held on *February 12, 1965,* at which time the creditors would consider a plan submitted by the debtor corporation. This plan envisioned the valuation of the Calhoun Estate's

secured claim at $2,500.00 *and would have paid general creditors 40% of the amount of their claims.* Petitioners were thus confronted with the possibility that their client would receive only $2,500.00 plus 40% of any remaining balance of its claim. *Petitioners expressed their firm opposition to such a plan and thereupon contacted the officials of Super Mold Corporation*

The officials of Super Mold Corporation, upon becoming interested in acquiring the debtors' assets, began dealing with the attorneys for the Trustee and the creditors committee, and indicated that it would bid not less than $400,000.00 upon a sale of the assets of the debtors. Based *upon this indication, the attorneys for the Trustee and creditors committee prepared a proposed plan of reorganization. Petitioners filed a somewhat similar proposed plan of reorganization* on March 22, 1965, except that in Petitioners' plan, as previously indicated, Petitioners sought attorneys fees as compensation for their efforts in the proceeding. In the meantime, attorneys for the debtor and the ultimate purchaser of certain of the debtors' assets were seeking to amend their original plan. Ultimately, as previously outlined, an amended debtors' plan was worked out by interested parties on March 30, 1965, and was subsequently approved and confirmed. Petitioners had continued to assert in their proposed plan that their client was a secured creditor and the Estate was so designated in the debtors' plan finally approved and confirmed. The approved and confirmed plan was not submitted by Petitioners *nor were their services rendered in connection with said plan.* The plan finally arrived at was made possible only by the attorneys for the creditors committee agreeing to pay Petitioners' client from funds otherwise available to general

creditors approximately $26,000.00. *Now, at this late date, Petitioners* contend that their efforts benefited the estate as a whole, whereas, during the period of negotiations leading up to the final plan Petitioners maintained a position diametrically opposed to the interests of general creditors.

Petitioners cite in support of their petition the case of *In Re Consolidated Motor Parts, Inc., 85 F. 2d 579 (2 Cir. 1936)*. In that case attorneys for a certain class of creditors were awarded attorneys fees for their opposition to a proposed reorganization plan which they contended discriminated against their clients and thereafter concurred in a new plan more favorable to their clients. The Court pointed out (p. 581) that:

> "... the mere fact that work which has substantially aided the plan finally approved has been performed by an attorney for creditors or stockholders owning interests adverse to some of the other parties, does not necessarily deprive him of compensation. The question is whether the work in connection with the plan has been performed in good faith and has substantially contributed to the result finally achieved."

The Court distinguished certain other cases in which compensation had been denied on the ground that in those cases the Petitioners had not substantially assisted in the formulation of the plan that was finally adopted. A later case in the Second Circuit, *Newman & Biscoe v. Realty Associates Securities Corporation, 173 F. 2d 609 (2 Cir. 1949)*, disallowed allowances awarded by the lower court to the extent sought in connection with an unsuccessful attempt to require the debtor corporations

to pay increased interest on the applicant's client's claims. See also *Warren v. Palmer 132 F. 2d 665 (2 Cir. 1942)* referred to by the Court in the *Newman* case.

In *Glasser v. Doyle, 223 F. 2d 811 (2 Cir. 1955)*, the Second Circuit refused to increase an allowance awarded by the District Court to an attorney. The Court pointed out (p. 813) that:

> "... he is not a court appointed officer but is the lawyer privately retained to represent the interests of a preferred stockholders' committee in the reorganization proceeding ... The legal services of an attorney so situated may be competent, diligent and calculated to serve the best interests of his clients, yet prove to be of little benefit to the administration of the debtor's estate. That such a situation existed here was an entirely permissible conclusion on the present record. We find no compelling reason for holding, contrary to the trial court's best judgment, that the debtor's estate was enriched or its administration advanced to any great extent by the labors of this claimant, however competent and conscientious they may have been."

In the case of *In Re Vernan Mfg. Co., 92 F. Supp. 861 (D. C. W. D. Pa. 1950)*, the Court refused to make an allowance in connection with services of attorneys for a stockholder and creditor of the debtor corporation. Petitioner's counsel had performed services in preparation and formation of a plan of reorganization which was rejected by the majority of creditors. The Court concluded that petitioner's counsel had acted as mere volunteers as to their proposed, but rejected plan. Moreover, the Court pointed out (p. 864) that:

"Petitioner cannot reasonably contend that his plan contributed substantially to rejection of the initial plan proposed by the Trustee, for Petitioner himself avers that the plan exists in amended form; or, if I conclude that the initial plan has been rejected, petitioner's opposition thereto was only a fragment of the opposition exerted by the majority of merchandise creditors.

"Were I to conclude that the plan of petitioner's counsel was beneficial to the estate, yet it is apparent that counsel acted solely for the interest of petitioner, the creditor by whom he was named to act. Even if services are beneficial to the administration of an estate, but were rendered in the sole interest of a creditor or stockholder, our courts have sustained the view that allowance may not be made for such services (citing cases)."

See also *London v. Snyder, 163 F. 2d 621 (8 Cir. 1947); Matter of 32-36 N. State St. Bldg. Corp., 164 F. 2d 205 (7 Cir. 1947).*

The standards governing this Court's deliberation on Petitioners' application have been best summed up in *11 Remington, Bankruptcy, § 4685 (1961 Revised.)* as follows:

"The right of an attorney to receive an allowance depends upon his representation of a class or some member of a class entitled to participate in the proceeding. The allowance is not for services rendered to the client, but for services rendered in assisting the client in rendering services which are compensable. If the attorney's efforts are directed primarily to promote his client's interests, the client

should pay him, and an allowance out of the estate is not called for. Attorneys representing creditors, security holders, or stockholders must look to their clients for compensation, rather than to the estate. The basis for an allowance is that services of value to the estate have been rendered—services which benefit all sets of interests in the estate."

This Court is of the opinion that the benefits to the bankrupt estate, if any there be, rendered by Petitioners in vigorously and diligently prosecuting the interests of their client, often to the possible detriment of other creditors of the debtor corporations, were too remote, unintended, and incidental to the primary purpose of said efforts to be susceptible of valuation by this Court, or compensable by allowance in this proceeding.

Accordingly, for the reasons set out in Section I and Section II of this opinion, Petitioners' application for attorney's fees and expenses is denied.

IT IS SO ORDERED this 14th day of July, 1965.

J. Robert Elliott
United States District Judge

THE COURT: The other thing I want to be sure of, if this plan goes through, Mr. Calhoun, every matter concerning which you have suggested any issue and every question which you have raised by any of the pleadings which you have filed in connection with the matter or any which could have been raised which you have not raised, will be terminated and disposed of; is that understood?

MR. CALHOUN: Your Honor, I'm happy to be bound by the agreement and upon the approval of a plan which provides $98,724.15 in cash, everything that we have in this proceeding will be dismissed.

THE COURT: Well, when you say "in cash", you mean at the same time all the other creditors are paid?

MR. CALHOUN: At the same time as the other creditors.

THE COURT: At the same time all the other creditors are paid.

MR. CALHOUN: Yes sir, and yet, we wish to reserve our right to dismiss until that date.

THE COURT: Oh yes, but the plan, when we talk about "the plan", when the plan is approved, if the Court approves it, that terminates every question which you have raised or could have raised?

MR. CALHOUN: Yes sir, I would rather state it that when a distribution is made under the plan, that settles everything, terminates everything.

THE COURT: All right, I wanted to be sure of those two things.

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Ground One

That this Court's denial of certiorari in this instance overlooks that the results that waiver of petitioners' rights will produce in this case are so contrary to the public policy of Chapter X of The Bankruptcy Act and so unconscionable that, after a clear and unequivocal denial of any intent to waive these rights was made and argued in open court before any change in position was made, a Chapter X Court as a Court of Equity would be in abuse of its discretion to order specific enforcement of waiver, and a Circuit Court in error to uphold this action 2

Ground Two

The denial of certiorari in this instance is a denial of the due process of law in the form of a denial of equity to one whose rights are being extinguished under powers which may not be exercised except in equity and accordance with Chapter X of The Bankruptcy Act 16

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1165

JOHN K. CALHOUN, Individually and as Attorney for the ESTATE OF C. F. CALHOUN

Petitioners

vs.

CHARLES C. HERTWIG, Trustee, Et Al,

Respondents

The Petition of John K. Calhoun, et al, for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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PETITION FOR RE-HEARING

Comes now, JOHN CALHOUN to petition for re-hearing of this Court's order dated May 8, 1967, denying his petition for writ of certiorari and for grounds, shows:

GROUND ONE

That this Court's denial of certiorari in this instance overlooks that the results that waiver of petitioners' rights will produce in this case are so contrary to the public policy of Chapter X of The Bankruptcy Act and so unconscionable that, after a clear and unequivocal denial of any intent to waive these rights was made and argued in open court before any change in position was made, a Chapter X Court as a Court of Equity would be in abuse of its discretion to order specific enforcement of waiver, and a Circuit Court in error to uphold this action.

The enforcement of waiver of petitioners' section 643 right is solely for the benefit of the controlling stockholders who under the plan shall profit to the exact extent of petitioners' loss by way of their entitlement to refund of any of the $56,000.00 now in the Trustee after the payment of all claims and all other fees and expenses.

Yet, these controlling stockholders occupy the position of the parent corporation in *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669. Den-Nap is in the position here that the subsidiary, Deep Rock, was in the *Taylor* case.

Here the controlling stockholders have taken $3,750,000.00[1] from Den Nap's 1950-1960 gross of only $10,000,000.00 via their Precision instrumentality and

[1]Record Vol. I, page 272, all figures of which may be verified from original reports of audits found in the Red Leather Bound Volume in the Record as an Exhibit to the Extraordinary Motion in the Circuit Court, which came forward from the Clerk of the Circuit Court separately, and is now in the Supreme Court.

their patent royalty contracts as depicted in Exhibit A attached.[2] In the *Taylor* case, the controlling parent took only $9,350,000.00 of Deep-Rock's $52,000,000.00 1919-1933 gross (59 S.Ct., at 545, right hand column). The "taking" from Den-Nap was roughly twice as harmful as that in the *Taylor* case where this Court intervened to prevent injustice to the independent minority stockholders who were preferred.

This Den-Nap operation represents a new but much used pattern *"of* (the) *spoliation . . . and faithless stewardship"* that *Taylor* speaks about, which very much merits the attention of this Court. Using parent corporations for control of subsidiaries to be milked is no longer *safe* or *popular.*

The new and wide-spread practice is for controlling stockholders to use a group of three or more corporations from one state, each of which is at all times insolvent, because the real assets and income of the entire group of corporations are concealed in an out-of-state corporation solely owned by the controlling stockholders alone. The out-of-state corporation holds the in-state group in *de facto peonage,* by contracts and other devices.

Look for a moment through the eyes of Judge Bootle as he discovered, three years late, the way it was done in this case.

Judge W. A. Bootle took this Chapter X in early 1961, but found out for the first time at the hearing of February 17, 1964[3] that a $1,000,000.00 asset in this reorgani-

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[2]Record Vol. I, page 299, also.

[3]Record Exhibit A to Extraordinary Motion for Rehearing in Circuit Court in Record Supplement forwarded separately from

zation called "Den-Air" was carried on the corporate audits in the proceedings at $4,417.00,[4] and that the earnings of this "Den-Air" entity had been completely concealed for three years in Chapter X.

We quote from pages 35-39 of these minutes.[3]

> "MR. CALHOUN: Could we find out from Mr. Fourcher whether this statement is a consolidated statement setting out Den-Air's profits or whether it is merely — you see, as long as you keep Den-Air on Precision's books as a wholly owned subsidiary at the value of the stock then what Den-Air makes, or the increase in Den-Air's net worth does not show on Precision's statement.
>
> "THE COURT: Den-Air is owned solely by Precision?
>
> "MR. CALHOUN: Yes, sir, as I understand it.
>
> "THE COURT: I don't believe the statements

Circuit Court on February 15, 1967. Also, Record Vol. II, falling after page 161, Minutes of Hearing of February 17, 1964.

[4]Record Vol. I, pages 18, 21; also unattached Appendix Two (Red Leather Bound) Exhibit V2, page 1. This was its original cost to Precision, that one of the three corporations which were created by the controlling stockholders to buy from them for $3,000,000.00 certain patents and to collect royalties and sales commissions from Den-Nap totalling 45% of gross sales of Den-Nap; Den-Nap, being the original corporation, 5/22 of the stock of which was owned by appellants' clients; Den-Nap also being the entity which alone was obligated to pay 90% of all the debt owed in this reorganization. Den-Nap was actually hopelessly insolvent until the cancellation of all its royalty obligation contracts and debts to Precision, a fact made clear by a careful analysis of the trustee's appraisal. Record Vol. I, pages 22-109.

I have seen show the earnings of Den-Air at all, do they?

"MR. FOURCHER: No sir.

MR. CALHOUN: "Could we – because as much as anybody would want to help, it's impossible to help without accounting for –

"THE COURT: Well, has Precision been getting any dividends, Mr. Trustee? Have you been getting any dividends from Den-Air lately? They are your wholly owned subsidiary, I understand.

"MR. HERTWIG: We have used their money, yes sir.

"THE COURT: You have used their money?

"MR. HERTWIG: No, no. We have used the rent that they pay to Precision. I would like to explain –

"THE COURT: But if they are worth a hundred thousand [sic] [1,000,000.00] and they are on your books at $4,000 maybe they can pay you some dividends. Have you looked into that?

"MR. HERTWIG: Well, they could possibly pay some dividends, yes sir, but they have not paid any. They bear some of the expense of such work as this corporation does for them, and pays them back to the proportion of the amount of work that Den-Nap does for Den-Air, but I don't think Den-Air is worth a million dollars. I think Den-Air's existence depends entirely on the existence of Den-Nap. They use their equipment, rent their equipment through Precision. The people who do business

with Den-Air probably do it because they have the backing of Den-Nap and if they were spun off in any way I don't think they would exist for a long period of time.

"MR. CALHOUN: Your Honor, one thing that would be the most helpful to those who would honestly help and are not in any way attempting to limit the performance of this group, one thing that would help enormously is if this Court would request the Trustee to request his auditor to give us a truly consolidated statement of all of the earnings of all of the owned entities and all of the related entities for each calendar year, by the calendar year. I don't know how much difficulty Mr. Saliba has but I spent, one time, about two weeks attempting to find out from an analysis of their financial statements, and with the help of Mr. Fourcher, who was most kind, and Mr. Dennis and Mr. Emerson, to analyze the earnings of the whole group of entities. The Trustee is doing a magnificent job, his attorney is doing a wonderful job, yet we are all hampered by the obscurity of the earnings and general financial situation of these interlocked entities.

"THE COURT: Well, hasn't he reported on all of it except his Den-Air?

"MR. CALHOUN: Yes sir, but the great difficulty arises out of the different fiscal periods and the different accounting methods used. One of these corporations, for example, is possibly on a calendar year basis with a cash reporting plan. One may be on a fiscal year that begins in July, with an accrual plan of computing its earnings. The third one — I

think cash and accrual are the only possibilities, so I presume the third one has to have one of those all over again, but it's on still another accounting period, which, Your Honor, creates enormous difficulties in trying to determine what amount of money was actually earned in any calendar year period. But if Mr. Fourcher could give us even for this last calendar year an income statement, a consolidated earnings and income statement, profit and loss statement, that would show the earnings of the entire group of corporations, including Den-Air, and any other thing that may be wholly owned, so that Mr. Saliba could be certain —

"THE COURT: Well, are there any other corporations wholly owned? We know about these three and Den-Air. Do they own any others?

"MR. CALHOUN: It has not come to my attention if they do, Your Honor.

"THE COURT: I never heard of any.

"MR. CALHOUN: But Den-Air is an extremely valuable asset.

"THE COURT: Well, I imagine somebody has been making audits for Den-Air down there. Do you do that, Mr. Fourcher?

"MR. FOURCHER: No sir.

"THE COURT: Well, you could get us an audit from whoever makes it, couldn't you?

"MR. FOURCHER: Yes sir.

"MR. MARTIN: Who is Precision Tire Company of Florida, Mr. Fourcher?

"MR. FOURCHER: That is a sales agent.

"MR. MARTIN: Who owns it?

"MR. FOURCHER: I really don't know who owns it.

"THE COURT: It's not owned by our outfits?

"MR. FOURCHER: It's not part of Den-Nap Electric Mold Company or Precision or Poplar Foundries or Den-Air, no.

"THE COURT: Mr. Calhoun, how much did you say you thought maybe Den-Air could be sold for?

"MR. CALHOUN: Well, now, Your Honor, I don't wish the Trustee to misunderstand that I would ever advocate selling that separately, because I think this might be economically unsound, but I believe that Den-Air is possibly worth — the entire Den-Air entity, Den-Air of Miami and these other leaseholds — well, we'll put it this way, Your Honor. It was represented to me by Mr. Clem Dennis, Mr. C. O. Dennis, the president of Den-Nap, that all of these leaseholds, including Atlanta, which was sold before this went into re-organization, that all of these leaseholds were worth in excess of two million dollars. The one in Atlanta was sold for, I believe, two hundred thousand dollars. I have this in correspondence. And, it has been said that Den-Air of Miami was worth a million dollars.[5] . . . . .

[5]Subsequently, the Trustee's appraisal, Record Vol. I, pages 23-109, confirmed that Den-Air assets were worth substantially $1,000,000.00 and produced very substantial earnings. The only annual earning statement produced by the trustee pursuant to

It was immediately after the close of this hearing of February 17, 1964 that Judge W. A. Bootle called in all counsel and announced his intended withdrawal from this Chapter X.

Judge Elliott succeeded to the case, and one year and one month later, during the morning of March 30, 1965 at Columbus, Georgia, he instructed the parties to work out a compromise by 2:00 or he would place the corporations in straight bankruptcy.[6]

Despite the controlling stockholders late consent to an appraisal it will never be known how much more the combined assets were actually worth.

We do not belittle or belabor this fine trustee or his competent attorney, and certainly not the District Courts.[7] The fault is not with any individual man. The

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this request of Judge Bootle covered only that part of the Den-Air earnings from Miami, Florida, which were shown to be $22,538.00 for twelve months ending June 30, 1962. This statement appears as Exhibit GG in the Unattached Appendix One, the Red Leather Volume of Exhibits which is now in this Court's record, and which was also an Exhibit to the Extraordinary Motion in the Circuit Court.

[6]Record Vol. II, pages 87-90.

[7]This situation has arisen from general inattention. Much of the blame must fall on those involved by circumstances in a number of Chapter X's, who have not been able to clearly see or communicate the missing ingredients which so often so greatly reduce the quality of justice and equity accomplished in Chapter X.

Looking back upon the experience of the representation of bondholders trustees, and stockholders from time to time in the Smith Lumber Co., the Douglasville Mill, the Knox-Atlanta, and the 33 Ponce de Leon Corp. Chapter X's in the Northern District of Georgia; the Miller Motor Lines Chapter X in the Middle District of North Carolina; and the Leopard Roofing Co.-Pharris

fault is with the theory that any one man with any title can do this difficult job *alone, without the trial court's aid and concern and participation.* The fault is the lack of thought-out appeals which let the changing facts speak to the Courts, that more realistic theories may be found for better, fairer rulings and results. The fault is the breakdown of communication between the law and the market place.[8] The fault is that a great advance in the complexity of corporate reorganization and the concealment possibilities in the accounting practices of these corporate complexities is not being met by intelligent

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Felt Paper Mill Chapter X in the Southern District of Mississippi, the instant case in the Middle District of Georgia and the Sone-United Southern Companies, Inc. Chapter X now proceeding in the Northern District of Georgia, it is now clear that the degree of concern and desire to comprehend on the part of the Court, and the degree of openness, fairness, and cooperation on the part of the controlling stockholders together determine both the degree of equity and justice accomplished in Chapter X, *and its cost in time and effort.*

[8]It has been said that the most important language for justice to speak in the 20th Century is "accounting" the language it never does speak. This is not true, but we need to take redouble precautions to see that it does not shortly come true in these days in which the complexity of our economic organizations and their computer-powered systems of accounting is multiplying at an almost explosive rate. It may be the time now for this Court to lead the United States Courts in a frontal attack upon the problem of developing the needed procedures and analytical aides, to deal with the increasing complexity of the accounting analyses needed. If need be the Court should have access to a computer center to enable it to cope with the complexities of problems involving accounting with genuine confidence and insight. Accounting practice needs the encounter much more than the Courts, and accounting practice has much to gain from the de-mythologizing that will surely result.

new rules promulgated by this Court requiring some simple, intelligent, and fair yet comprehensive and understandable forms which clearly show *consolidated earnings and assets* of all jointly controlled corporations, and which also show, separately, the net *balance of payments* or ultimate consolidated cash flow between these related corporations.

The faulty result is that today too often our reorganization Courts are overwhelmed by the maize of figures thrown at them just as Judge Bootle was. Unfortunately, too often, the Courts resign from their responsibility to know the facts essential to mete out equity and fairness. Courts do this without realizing that this carries with it the surrender of the Court's great bankruptcy powers to those in control of the reorganization, even though the Court stays physically present throughout.

The correction of this surrender tendency in the lower courts is helped most when this Court acts to insist that there are equitable responsibilities which lower courts must require from controlling stockholders. This Court did just this in its 1965 *American Trailer*[9] pronouncement. *American Trailer* now prevents coerced Chapter XI composition by controlling stockholders before the Chapter X investigation needed to supply the understanding equity requires when secured creditors and many public outside stockholders' rights are affected — at least where S.E.C. is present.

Today this Court has before it another opportunity to fill in and make more explicit this standard of fair play needed from controlling stockholders, as well as the degree of independent understanding that fairness re-

[9]S.E.C. v American Trailer Rental Co., 85 S.Ct. 513, 379 U.S. 594.

quires of the lower courts in reorganization. Here as in *American Trailer,* a composition was coerced before any real understanding of the full extent of the wrongs of the controlling stockholders was accomplished, but here there is an opportunity to correct the attempted penalization of one who tried to prevent it.

The greatest good for that 95 per cent of all reorganizations which are small reorganizations, because 95 per cent of all businesses are small,[10] and the several thousand people affected by them, to the extent of many millions each year, shall grow, slowly, but surely, from the example that this Court may itself set. If this Court will undertake the task of making provisions which will make understandable economic facts behind the accounting veil woven around these multi-corporate debtors, it will strike a blow at the kind of difficulty encountered in today's reorganizations, and the kind of difficulty district courts understandably avoid if possible.

From the statistics of the Administrative office of the United States Courts, it appears that about 2/10,000[11] of the nation's 4,750,000 small businesses[12] and the same fraction of small business assets pass through federal reorganizations each year. Since each of the small non-S.E.C. reorganizations like this one, touch several hundred individuals, these proceedings affect a very significant number of people and control redistribution of a very significant total of assets. As a result the influence

[10]Statement by Bernard L. Botin, Small Business Administrator, before the Senate Select Committee on Small Business March 1, 1967, 10:00 a.m., Table III, as printed and distributed to S.B.A. Regional Directors.

[11]Tables of Bankruptcy Statistics, ending June 30, 1966.

[12]Small Business Administrator's Statement, Table III, Supra.

and effect of unfairness in any given reorganization is more significant than the same degree of unfairness in any ordinary case.

Previously an effort has been made to show the non-existence of any valid or sufficient basis for waiver of appellants' rights in this case under Equity and Chapter X law. We do not now abandon any part of that position; we would even like to further strengthen it with the attached Exhibit B, another piece of correspondence to the trustee's attorney while the matter was still in the trial court's hands.

Since Socrates' trial, to negative in argument a point never really covered in trial, has been acknowledgedly quite difficult. It is for this reason, *in extremis,* we now ask the Court to consider this valid and *positive basis* for the restoration of our rights. The positive contention that:

The result that waiver will produce in this situation is so contrary to the public policy of Chapter X of The Bankruptcy Act and so unconscionable that a Chapter X Court in Equity could not enforce it *after a clear and unequivocal denial of any intent to waive was made and argued in open court before any change in position was made.*

Here appellants did expressly show beyond any possibility of doubt by their fee petition[13] and affidavits[14] served before, and by arguments in open court during

[13]Record Vol. I, pages 110-130.
[14]Record Vol. I, pages 131-139, 140.

the fee hearing in Macon on May 4, 1964,[15] that waiver of their fees was not their intention or their understanding of the Court's desire earlier on March 30, 1964[16] at the plan hearing in Columbus. The statements made and affidavits presented in Macon at the hearing upon compensation for contributions to Chapter X removed the possibility of doubt or misunderstanding on this point. These statements were made before the controlling stockholders had made any payments upon their composition-with-creditors, which itself negatived such a waiver agreement by not setting it out.

Brookhart v. Janis, 86 S.Ct. 1245, 384 U.S. , ____ L. Ed. ____, decided by this Court points to the federal nature of the question of the waiver of federal rights.

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461."

> "In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver. Upon an examination of the facts shown in this record, we are completely

[15]Record Vol. I, pages 178-187.

[16]Record Vol. I, pages 234-236.

> unable to agree with the Supreme Court of Ohio that the petitioner *intelligently* and *knowingly* waived his right . . ." (Emphasis added)
>
> *Brookhart v. Janis, supra,* at 1247

Brookhart striking down the invalid waiver of a specific federal constitutional right shows that intentional relinquishment is a logically, as well as equitably, impossible finding where the record shows even one clear contradictory statement, before a change in position.

Nowhere could one find affidavits[17] and statements, given in open court[18] *before any change of position* establishing the absence of an intent to waive Chapter X fee rights any more clearly than those found in this case.

This positive and indisputable lack of knowing or intelligent intent to waive, without more, calls for this Court to prevent the specific enforcement of this waiver in this Chapter X as a matter of Equity and fairness to one who contributed much, neither directly or indirectly receiving fair compensation.

Yet, it is the complete defeat of the public policy in Chapter X of The Bankruptcy Act which will result unless this Court will correct this abusive use of this federal act, which makes it urgent that this Court take jurisdiction of this case.

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[17]Record Vol. I, pages 173 to 177.

[18]Record Vol. I, pages 178 to 187.

GROUND TWO

The denial of certiorari in this instance is a denial of the due process of law in the form of a denial of equity to one whose rights are being extinguished under powers which may not be exercised except in equity and accordance with Chapter X of The Bankruptcy Act.

> "Bankruptcy courts have been variously referred to as courts of equity,[19] courts of equity in essence,[20] virtual courts of equity,[21] courts of equity within a limited field,[22] and the like,[23] . . . for the purpose of emphasizing the applicability of principles of equity in (these cases)."

The denial of petitioners' established 11 U.S.C. 643 rights is held within discretion by the Circuit Court on

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[19]Columbia Foundry Co. v. Lochner (CA4 Md.) 179 F.2d 630, 14 ALR2d 1349; Re Pennsylvania Cent. Brewing Co. (CA3) 135 F.2d 60.

[20]Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U.S. 648, 79 L.ed 1110, 55 S.Ct. 595; Local Loan Co. v. Hunt, 292 U.S. 234, 78 L.ed 1230, 54 S.Ct. 695, 93 ALR 195; Bardes v. First Nat. Bank, 178 U.S. 524, 44 L.ed 1175, 20 S.Ct. 1000; Stucky v. Masonic Sav. Bank, 108 U.S. 74, 27 L.ed 640, 2 S.Ct. 219; Mason v. Wolkowich (CA1) 150 F. 699.

[21]Re Standard Gas & E. Co. (CA5) 139 F.2d 149, cert. den. 321 U.S. 796, 88 L.ed 1085, 64 S.Ct. 848.

[22]Sylvan Beach v Koch (CA8) 140 F.2d 852.

[23]Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act. Young v Higbee Co. 324 U.S. 204, 89 L.ed 890, 65 S.Ct. 594.

A bankruptcy court is a court of equity, at least in the sense that in the exercise of the jurisdiction conferred it by the Act it applies principles and rules of equity jurisprudence. Pepper v Litton, 308 U.S. 295, 84 L.ed 281, 60 S.Ct. 238.

the basis of the trial courts' finding that payment of the Section 643 rights of petitioner is included in the composition payment made to petitioners' clients.

There is no legal basis for this holding that the composition payment paid these Section 643 allowances. There is no clause, phrase, or provision of any kind covering release or payment of these allowances in the composition as a whole or in that provision of the composition relating to the payment for petitioners' clients secured debt and stock, which is attached as Exhibit C.

The refusal of petitioners' clients to accept this composition payment as long as it was conditioned upon executing a release reciting that petitioners' II U.S.C. 643 allowances were also paid off by this payment, eliminates implied contract as a basis for such a holding. Moreover, the clear opportunity of the major stockholders to refuse payment if satisfaction of petitioners' allowance was part of their bargain, coupled with their failure to do so, rules out any estoppel as a basis for extinguishing petitioners right.

Petitioners' clients accepted the composition contract and stand by their acceptance as that contract is written, and so do petitioners. The controlling stockholders' attempted to persuade or force petitioners to release their own Section 643 allowances as a condition of their clients being paid. The controlling stockholders failed in this attempt. Petitioners refused to accept payment for their clients until the additional un-contracted-for condition of the extinction of their rights was removed.

The controlling stockholders then elected to fully perform the composition contract, at that time wholly exe-

cutory, in outward conformity with petitioners' understanding, and after express notice that under petitioners understanding that the composition contract did not include payment for petitioners' Section 643 allowances. As a result of this acquiescence in the meaning of the composition contract before its execution any *later reformation,* after execution of the contract to extinguish petitioners' Section 643 allowances as paid by this contract is equitably impossible.

If the issue as to knowledge or foreseeableness is determined against the one seeking reformation in equity, he is not entitled to relief, *Liggett v. Koivunen,* 227 Minn. 114, 34 N.W. 2d 345.

Clearly the extinguishment and discharge of petitioners' II U.S.C. 643 rights on the ground that these rights were paid by the composition payment to petitioners' clients is without any substance of equity or right of law which results in any such a holding being error beyond discretion.

CONCLUSION

Blaise Pascal defined the needs of small reorganizations well when he wrote:

> It is right that what is *just* should be obeyed;
> It is necessary that what is *strongest* be obeyed.
> Justice without might is helpless,
> Might without justice is tyrannical.
> We must then combine justice and might, and
> Make what is just strong; or what is strong, just.[24]

But, in the area of small reorganizations this twain shall never meet until this Court lends its might to that challenging task that others are now avoiding. This case is a good one for this purpose.

JOHN K. CALHOUN
Individually, and as Attorney for
the Estate of C. F. Calhoun

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[24]Pensees, 1670, edited and published as Great Ideas of Western Man, by Container Corporation of America.

CERTIFICATE OF COUNSEL

I, John K. Calhoun, do certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 of the Rules of this Court.

/s/ JOHN K. CALHOUN

CERTIFICATE OF SERVICE

I, John K. Calhoun, certify that a copy of this Petition for Re-hearing has been furnished by mail to counsel of record for Charles C. Hertwig, et al; Charles Cork, Paul R. Erwin, Wallace Miller, Jr., Baldwin Martin, Jr., and George Saliba, Esquires, at their respective addresses.

This 31st day of May, 1967.

/s/ JOHN K. CALHOUN

EXHIBIT A

'50-60 $10,000,000.00 Gross

DEN - NAP
(owes $250,000 to Dennis and Mattox; $750,000 to Precision)
Value:
(-550,000.00)
3,750,000.00

POPLAR
owes $377,000 to Precision
Value
(-250,000)

DEN - AIR of FLORIDA
today, 30-40 thousand annual earnings after taxes
today, in Bank, 85,000.00

DEN - AIR of CALIFORNIA
Income ?
Value?
wholly owned operating co.open

Den Nap's 45% gross beginning in 1954

DEN - AIR of FLORIDA today, 30-40 thousand annual earnings after taxes today, in Bank, 85,000.00

DEN - AIR of CALIFORNIA Income ? Value? wholly owned operating company

(Actual retreading operations)

45% gross beginning in 1954 Den Nap's

3,750,000.00

PRECISION

Value:

$1,000,000.00

(still owes 1,500,000.00 to Dennis and Mattox)

1,600,000.00

DEN - AIR LEASING AND LICENSING
(to independent Air-craft re-treaders)

Atlanta*

New York

Tulsa

California

(today, 60-70 thousand net after taxes)

DENNIS - MATTOX

$1,600,000.00 in accumulated income from Precision

$1,600,000.00

*Duke Tire in Atlanta bought its equipment hence does not pay lease rental

EXHIBIT B

May 17, 1965

Mr. Wallace Miller
Miller, Miller & Miller
Persons Building
Macon, Georgia

In re: Den-Nap

Dear Wallace:

What a comedy of errors the denial of fees to Russell, Watkins, and Calhoun is turning out to be.

After learning of your misunderstandings, it is easier to see why the Judge misunderstood that our efforts to get a fee from Den-Nap were simply spite, thought up after the event.

As is completely clear now, we expected and insisted upon a fee long before any mention was made of an attempted reclassification of the Calhoun claim. And, this expectation of a fee, which was clearly brought home to you in our letter of July 3, 1964, is different in amount from our present expectation of a fee simply because a good two-thirds of the work for General Russell, all of the work for Charles Watkins, and three-fourths of my work fell after that fee request of July 3, 1964.

We have not raised our claims for fees for ourselves on account of anything but the greatly increased amount of work done since July, 1964.

We might add that General Russell, my sister, and I all thought that the letters back in 1964 about giving the Calhoun Estate claims less than the amount of their secured creditors claims were just simply old lawyer-type

poker playing. We were certain that Dennis did not want to have to pay anything for Dad's stock. We thought he was making a show about a couple of bucks knocked off the secured creditors' claim to soften us up for a good price on the stock.

This is why in our letter of July 3, 1964, after saying that the creditors' claim was $96,000.00 (ninety six thousand odd dollars), we went on to say:

> "... except for getting the company in the financial bog he got it in, Clem has kept faith with Daddy every step of the way. If Clem will see the Estate is paid, Martha and I and General Russell would want to sell it (the stock) to Clem for $1.00."

So much for why we are now contending for such substantially different attorneys fees and costs than we were contending for in the middle of 1964.

Now for our session on Thursday, March 25, 1965.

If you will recall, I opened up on my telephone call to you from Jackson, Georgia, about 11:15 in the morning as I came to Macon, with the two questions:

"Wallace, how is our purchaser and your plan getting along."

"How about lunch?"

You and your brother were kind enough to wait up lunch for me although I did not get into Macon until nearly 12:30. I met you two in front of the Persons Building as you were headed to the Lanier Hotel for lunch.

All through lunch we talked about the possibility of

the Super Mold Corporation making a bid in the manner you desired.

A large part of the time was spent kidding you about writing up the Plan for the Creditors' Committee and trying to highjack our Purchaser — all for the common good, of course.

If you will recall, we spent some little time on what I considered to be the inadequacy in the Creditors' Committee's Plan which Martin and Saliba had said you had written. Then as now, in my estimation it gave no fair means of evaluating the subordinated (if not eliminated) claims of Dennis and Mattox and the Den-Nap stockholders.

I told you that I felt if we wanted to get a Plan approved that would stand the test of objection and appeal, we had better either consolidate our plan's competitive sale feature into your plan for the Creditors' Committee or use our plan, dubbed by the Court as the Calhoun Plan.

If I am not mistaken, we had gotten back to your office by this time in this discussion. At any rate, we were back in your office when I asked you since I had furnished the purchaser did you not think I was entitled to a fee whatever plan we used to consummate a sale to Super Mold, because, of course, having a purchaser was more important than having a plan.

You said you felt that I was entitled to a fee for having come up with a purchaser, but that I was not entitled to any stock in the new company also, and Super Mold was objecting to my request for stock.

Then,

(and this is quite clearly the point at which the misunderstanding between you and me arose)

I told you that if you had no objection I wanted to take the fee in stock if Super Mold would go along with it because very probably the children would get little or no money for their stock and if I could take the fee in stock in the new company to be organized, I could conceivably keep the children from losing the value of their stock and I might be able to give them the stock I received as a fee without as great a tax disadvantage as there would otherwise be.

I told you that though I was a poor struggling-type that it appeared that we might have to sell a piece of land that we had as a law fee for the right-of-way for I-75 over back of Broadview Shopping Center and that I thought it would be a good thing for me to get my fee in stock in order that the children would not only have the benefit of the debt claim of substantially $100,000 tax free, *but that also the children would not have to lose their stock interest or even roll it ever into cash and back into some other investment where it would be reduced by the amount of the taxes owed.*

In short, I told you my desire was to get the children their $100,000 cash from the debt claim which is nontaxable in their situation *and take compensation for their stock claims and for my fee in stock if this be possible.*

As you noted, Super Mold was not happy with this. It probably could not have been done with Super Mold

and to say the least it does not now appear to be possible to do this with Den-Nap.

(However, except for the fact that $12,000 may well be too little to fool with from Den-Nap, I would be equally happy to take my fee in Den-Nap stock provided it was 7 per cent preferred stock or subject to some guaranteed plan of annual repurchase.)

At this point our conversation was interrupted by your 2:00 appointment. The pressure of getting the eight copies of our Exhibits to Calhoun vs. Dennis and Mattox bound kept me so busy while I was in Macon we never were able to finish that conversation.

However, I left thinking that it was clear in your mind:

1. We wished and thought we deserved a fee for our contribution.

2. You agreed.

Wallace, I regret your lack of understanding of all that I said, but everything I said to you Thursday, March 25, 1965, from twelve-thirty to two o'clock or five minutes afterward, was in the vein of "We have done an enormous amount of work and we expect a fee."

The only variation on this simple, direct message was "We would appreciate it if the fee can be paid in stock along with the compensation for the children's stock claim which we wanted to see paid in stock."

Very truly yours,
JOHN K. CALHOUN

JKC/bbt
cc: General H. D. Russell
Charles Watkins

EXHIBIT C

ARTICLE V

CLAIMS TO BE PAID IN CASH IN FULL

The claim included in class 1 is to be paid in cash in full, with interest as called for in the note and deed to secure debt to the date of payment.

(End of page 3 of controlling stockholders second plan R, Vol. I, p. 357)

(Beginning of page 4 of controlling stockholders second plan, R. Vol. I, p. 358)

The claim included in class 2 is to be paid in full a total of $98,724.15 in cash. The sum of $72,300.00 shall be paid said claimant by the Trustee from the assets in his hands. The sum of $26,424.15 shall be paid claimant by the holders of general claims, the same to be disbursed for the accounts of said claimants by the Trustee from assets in his hands. Upon consumation and distribution hereunder, the Estate of C. F. Calhoun will dismiss with prejudice any and all claims it or any beneficiary of it has against Den-Nap, Polar, Precision, Dennis, Mattox and Retreating. In addition, it will cause to be delivered for cancellation the certificate issued in the name of C. F. Calhoun representing five shares of the common capital stock of Den-Nap, and deliver the Calhoun patents.